SUPREME COURT OF THE UNITED STATES.

No. 249.

JAMES B. AND JOHN NICHOL, COMPLAINANTS AND APPELLANTS,

vs.

LYON J. LEVY ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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1 MIDDLE DISTRICT OF TENNESSEE:

At a circuit court of the United States begun and held at the Capitol of said State, in and for the district aforesaid, on the (3d) third Monday, being the (17th) seventeenth day of October, in the year of our Lord one thousand eight hundred and sixty-four, and in the (89th) eighty-ninth year of the independence of the United States.

Present: The Honorable Connally F. Trigg, United States district judge for the districts of Tennessee; present also, Edwin R. Glascock, marshal, and Edward R. Campbell, clerk of said court.

On the 18th day of August, A. D. 1860, a bill was filed in said court which is in the words and figures following, to wit:

Bill.

To the circuit court of the United States for the middle district of Tennessee:

James Beal Nichol, and John Nichol, junior, citizens of Davidson
2 County, Tennessee, complainants, bring this their bill of complaint against Lyon J. Levy and Charles C. Guyon, partners, trading in the name of L. J. Levy & Co., citizens of Pennsylvania; Thomas Wood, Edward L. Wood, and Horatio N. Cavey, trading in the name of Thos. Wood & Co., citizens of Pennsylvania; William A. Everly, and William E. Kain, trading in the name of William A Everly & Co., citizens of Pennsylvania; William H. Inskup, Henry A. Shackleford, and John H. McKee, trading in the name of Inskup, Shackleford & McKee, citizens of Pennsylvania; Alexander T. Stewart, William H. Barron, Francis Warder, and John H. King, trading in the firm name of A. T. Stewart & Co., of New York; Thomas C. Doremus and John M. Nixon, trading in the name of Doremus & Nixon, citizens of New York; John R. Jaffray, Authur W. Jaffray, and Edward S. Jaffray, trading in the name of J. R. Jaffray & Co., citizens of New York; James Watson and Joseph H. Hildeburn, trading in the name of Watson & Hildeburn, citizens of Pennsylvania; Edward or Elsworth Cheseborough, Ezra M. Kingsley, and Thomas G. Stearnes, trading in the name of Cheseborough,
Stearnes & Co., citizens of New York; Charles D. Carleton and Alex-
3 ander R. Frothingham, trading in the firm name of Carleton & Frothingham, citizens of New York; John M. Odenheimer, James Tennent, S. B. Dickinson, John W. Geller, John C. Peason, S. B. Barber, and F. Campbell, trading in the name of Odenheimer & Tennent, citizens of Pennsylvania; all the foregoing, creditors of James Beal Nichol. William H. Inskup, Henry A. Shackleford, and John H. McKee, trading in the name of Inskup, Shackleford & McKee, citizens of the State of Pennsylvania; Samuel Cochran, Charles P. Cochran, Thomas Cochran, and William Barthour, trading in the name of Samuel Cochran & Co., citizens of New York, the two latter firms, creditors of James B & John Nichol, junior. William A. Everly and William E. Kain trading in the name of Wm. A. Everly & Co., citizens of Pennsylvania, the last creditors of John Nichol, junior, defendants.

A thereupon complain and say that on or about 30th of December, 1846, their grandfather, Beal Basley, a citizen of Davidson County, Tennessee, made and published a last will and testament, in which he gave your orators a tract of land hereinafter described or referred to. That in the autumn of
the year 1849, your orators had become embarrassed in their business
4 of merchants in the town of Nashville, Tennessee, to insolvency, and among their creditors in said business were the defendants in the introductory part of this bill named. That the said Beal Basley,

being apprised of the said embarrassment of your orators and being desirous that the property that they should derive from him should, after his death, be enjoyed by them, and should not be taken to pay their said debts, on the 13th day of October, 1849, by his deed of that date, registered in the office of the register of Davidson County, Tennessee, in Book No. 12, pages 489 and 490, conveyed to John Nichol, senior, all the lands owned by him, said Beal Basley, lying north of the road leading from Nashville to Hyde's Ferry, known and designed as the "Hyde's Ferry road," being part of the tract on which said Beal Basley then resided, and for many years had resided, said part being bounded by said Hyde's Ferry road, by Cumberland River, and by the lands of Owen; also one half of a tract of about seven hundred acres, owned by said Basley, situate on the Cumberland River at the mouth of White's Creek, including the mouth of said creek; said half of said tract being the lower half, and separated from the other by a dividing line run by David Love, and being
5 the same at the date of said deed occupied by a tennant placed on the same by James Beal Nichol; also one third of all the slaves of whom the said Beal Basley might die possessed; also all other property whatsoever devised or bequeated to the said James Beal Nichol and the said John Nichol, given by said Basley in and by his last will and testament theretofore executed, or which might descend to them in case of his intestacy, partial or total. To have and to hold the said land, slaves, and other property therein given, granted, and conveyed, or intended so to be, to the said John Nichol, senior, and his heirs forever, in trust, nevertheless, for the following uses and purposes; that is to say, that the said John Nichol would permit the said Beal Basley to possess, use, and occupy the said land, slaves, and other property for and during his natural life, and during said period for the sole and exclusive use of the said Beal Basley, and after his death, that the said John Nichol, senior, would permit the said James Beal Nichol and John Nichol, junior, jointly or in severalty, according to any division into two equal parts that might thereafter be made between them, to have, possess, use, occupy, and enjoy the said property, and receive the
6 rents, issues, and profits thereof; but so that neither the said property, nor the rents, issues, and profits thereof, should ever be liable for any of the present then existing debts, whether due or not due, or the then existing contracts of the said James Beal Nichol and John Nichol, jr., or either of them, or to any incumbrance, liability of lien, that they or either of them, or their property were then subject to for said debts or contracts, or by any act, default, or transaction of their own whereby they might attempt to make the same liable for said debts or contracts, and after the then present debts and liabilities of the said James Beal Nichol and John Nichol, jr., should have been extinguished, and they entirely discharged therefrom, then the said John Nichol, sr., should hold said property and every part thereof in trust to convey the same to the said James Beal Nichol and John Nichol, jr., in fee and absolutely, either as tenants in common or in severalty, and in such manner as might be agreed upon by and between the said James Beal Nichol and John Nichol, jr.

That the execution of the said deed was the voluntary act of the said Beal Basley, unsolicited by your orators, or by any other person for them, and was free from the suspicion of fraud or practice of any kind on
7 part of your orators, the sole purpose of said Basley being to secure to your orators what he intended to give them by a deed upon the trusts aforesaid, instead of securing the same to them by will.

That afterwards, to wit, on or about the 3d day of October, 1850, the said Beal Basley, filed his bill, No. 625, in the chancery court of the State of Tennessee, at Nashville, against the said John Nichol, sr., James Beal Nichol,

and John Nichol, jr., your orators aforesaid, alledgeing that the said deed had been incorrectly drawn, and asking that the same might be reformed, so as to express his true intentions. That during the pendency of said bill, to wit, on the 10th of April, 1851, the parties thereto agreed to and did submit the matter in controversy in said suit to the arbitration of John Marshall, Francis B. Fogg, and Russell Houston, and agreed that their award should be made the judgment of said chancery court at Nashville.

That on the 3d of May, 1851, the said arbitrators submitted their written award to said court, whereby they awarded that it was the intention of said Beal Basley to convey to said John Nichol, senior, by his said deed of 13th of October, 1849, only an interest of one half of the land therein de-
8 scribed, and that the drawing of said deed so as to pass the entire interest in said tract of land was a mistake of fact, on part of said Basley, and that the same should be reformed so as to express the true intent of the said Basley.

That, thereupon on the day of June, 1851, said award was incorporated into and made a part of the decree of the said chancery court in said cause, by which decree it was further ordered that said deed be so reformed and corrected as to pass to said John Nichol, sr., his heirs, &c., upon the trusts contained in said Basley's deed to him, the fee simple interest in the one half of said tract of land, and that the defendants to said suit, your orators and said John Nichol, sr., be perpetually enjoined from setting up claim to any larger interest therein than an undivided moiety thereof; and the said decree was duly registered in the office of the register of Davidson County, Tennessee, in Book No. 14, pages 608, 609 and 610.

That afterwards, to wit, on the 29th of September, 1851, the said Beal Basley filed his other original bill, No. 763, in the said chancery court of Tennessee, at Nashville, setting forth the execution of the said deed of 13th of October, 1849, and the action of said chancery court upon said
9 deed just recited, and praying for a division of said land according to the terms of said decree; and thereupon said chancery court appointed commissioners to dive said land according to the prayer of said bill, who returned a written report to said court, which report was adopted; and it showed that, on survey of the land, the commissioners found the tract to contain 666¾ acres, and that they had divided the same into two parts, giving the metes and bounds of each; the one nearest Nashville containing 308⅜ acres, and the other 358⅜ acres; and that they had alloted the former to your orators, and the latter to said Basley. And said commissioners filed a plat of said land, and of their partition with their report.

Whereupon, on the 10th day of May, 1852, the said chancery court decreed that the remainder interest in fee in the entire tract of 666¾ acres be divided according to said report, and that all the title and interest of said John Nichol, sr., and your orators in and to said parcel of 358⅜ acres, be divested out of them, and be invested in the said Basley and his heirs in severalty, and that all the title and interest of said Basley to the remainder interest
10 of the said tract of 308⅜ be divested out of him, and be invested in said John Nichol, sr., and his heirs, upon the trusts contained in said Basley's deed aforesaid, of 13th of October, 1849; and said decree was registered in the register's office aforesaid, in Book No. 16, page, 129 and 130.

That the defendants, who were creditors of your orators before the said 13th October, 1849, have recovered judgments against them in this court, as follows:

Against James Beal Nichol, alone: L. J. Levy & Co., Sept. 8, 1849, for $11,768 75, besides cost, $20 23; Thos. Wood & Co., Sept. 8, 1849, for $2,672 36, besides costs, $20 23; Wood, Carey & Co., Sept. 8, 1849, for $526 25, besides costs, $20 23; Wm. A. Everly & Co., Sept. 8, 1849, for

$1,198 91, besides costs, $20 03; Inskup, Shackleford & Co., March 8, 1850, for $781 58, besides costs, $20 03; A. T. Stewart & Co., March 8, 1850, for $731 68, besides cost, $20 03; Doremus & Nixon, March 26, 1853, $1,113 77, besides costs, $33 13; J. R. Jaffray & Sons, March 26, 1853, $853 81, besides costs, $33 13; Watson & Hildeburn, March 28, 1853, $1,342 43, besides costs, $32 98; Cheseborough, Stearnes & Co., March 28, 1853, $662 69, besides costs, $32 98; Carleton & Frothingham, March 28, 1853, $1,227 32, besides costs, $32 98; Odenheimer & Tannent, May 14, 1855, $718 72, besides costs, $20 50. Against James B. and John Nichol, jr.: Inskup, Shackleford & McKee, March 8, 1850, $1,129 61, and costs, $25 03; Sam'l Cochran & Co., March 26, 1853, $2,048 18, costs, $25 98. Against John Nichol, jr., alone: Wm. A. Everly & Co., March 8th, 1850, $938 54, costs, $20 03.

11

That on the 11th of August, 1854, two bills were filed in the chancery court of the State of Tennessee, at Nashville, against your orators and the heirs of the said John Nichol, sr., he having died in the meantime, one of them by the defendants, Samuel Cochran & Co., for themselves and for the defendants, Inskup, Shackleford & McKee; the other by the said Samuel Cochran & Co., for themselves, and for the defendants, Doremus & Nixon, Inskup, Shackleford & McKee, Carleton & Frothingham, Cheseborough, Stearnes & Co., Watson & Hildeburn, and J. R. Jaffray & Sons. And on the 22d day of April, 1850, the defendants, L. J. Levy & Co., filed in the same chancery court, another bill, No 574, against your orators and said John Nichol, sr., and others, for themselves and for the defendants, Thos. Wood & Co., Wood, Carey & Wood, William A. Everly & Co., Inskup, Shackleford & McKee, Alex. T. Stewart & Co., and for the following firms, not made defendants herein, but who had recovered judgments against your orators in the circuit court of Tennessee for Davidson County, to wit: M. L. Hallowell & Co., Sibley, Molton & Woodruff, Wood & Wilsons, Atwood & Co., and Fassett & Co.

That all said bill alleged the facts hereinbefore set forth, and prayed that the interest of your orators in the land aforesaid, of $308\frac{3}{8}$ acres, conveyed to the said John Nichol, senior, by the deed of the 13th of October, 1849, of the said Beal Basley, might be subjected, by the decree of the said chancery court, to the satisfaction of said judgments.

12

That said bills were answered by your orators and the other defendants thereto, and all of them having been consolidated by an order of said chancery court, the cases were brought to trial in said court, at November term, 1858. And on the 10th day of said month said court pronounced a decree in the same, and thereby dismissed said bills, among other reasons for this, that under the act of the legislature of Tennessee, passed October 18th, 1832, entitled "An act to amend an act entitled 'An act to abolish imprisonment for debt, except in cases of fraud,' passed December 14th, 1831." The said $308\frac{3}{8}$ acres of land could not be subjected to the satisfaction of said judgments and was not liable for your orators' debts contracted before the 13th of October, 1849, the date of the conveyance aforesaid, by Beal Basley to John Nichol, senior.

That, from the said decree of the chancery court aforesaid, the defendants herein prayed an appeal to the supreme court of Tennessee, to be held at Nashville, in December, 1858, at which term, to wit, on the 30th day of January, 1859, said supreme court pronounced a decree in said cause, affirming the decree of the chancery court; all which will more fully and at large appear on reference to a transcript of the record of the supreme court in said cause, which is herewith filed and to be taken as part hereof.

13

That said controversy having been, as your orators supposed, definitely settled, they proceeded to have said lands or a part of them subdivided in

a suitable manner for the sale of part of them, and in the month of April, 1860, 25 acres of the same were sold to Thomas Deadrick; 22 acres to E. C. Lesseur; 1 acre to Charles Barry; 3 acres to one Ozanne, and 2 acres to J. L. Mercer and J. L. Coltrell. That on or about the 3d day of May, 1860, the said Beal Basley departed his life; that on the 12 of July, 1860, the defendants caused executions to be issued from the office of the clerk of this court, upon their aforesaid judgments, and placed the same in the hands of the marshal of the middle district of Tennessee, who has levied them upon the said $308\frac{3}{8}$ acres of land, and has advertised said land for sale on the 8th of September, 1860, in order to satisfy said judgments.

14 That your orators are advised that the adjudication of the supreme court of Tennessee, that the land aforesaid being the same that has been levied upon by the said marshal, is not liable for the debts and judgments, and that the said land cannot be subjected to the payment and satisfaction of said debts and judgments is conclusive upon the defendants; and bars further proceedings upon said judgment by way of execution or otherwise against said land, and that your orators have a right to demand from this court a perpetual injunction against the sale of said land, and to prohibit them from causing the same to be again levied upon by virtue of executions founded on said judgments.

To the end, therefore, that said defendants and their solicitors, and the officers of this court, and all persons acting under their direction in the premises may be prohibited by injunction from this court to proceed further under said judgments, and commanded to desist from the sale of said lands under the said executions, and that your honors may decree that the said land is not subject to the payment of the said debts created before the 13th of October, 1849, and that your orators may have such other relief in

15 the case as they may be entitled to, may it please your honors to grant the writ of injunction aforesaid, and to compel the defendants, and each of them, by subpœna to answer according to the of the court, to appear before your honors to answer this bill, and to state:

1st. Whether the debts upon which the judgments said defendants are now attempting to enforce by execution from this court are founded, were not of earlier date than the 13th of October, 1849.

2d. Whether all the proceedings set forth in the transcript from the supreme court of Tennessee, at Nashville, made a part of this bill, were not founded upon the bills therein transcribed, filed by them in said chancery court of Tennessee, at Nashville.

3d. Whether they, the said defendants, did not present in said bills the question of the liability of said land to said debts; and whether said court did not decide that they were not so liable.

And may it please your honors, also, to compel said defendants, by subpœna, to answer the whole of this bill, as though the same were repeated in the shape of interrogatories, and as in duty, &c.

JOHN TRIMBLE,
R. J. MEIGS,
EWING & COOPER, *Sol's.*

16 *Affidavit.*

James Beal Nichol and John Nichol, jr., complainants in the foregoing bill, make oath that the facts stated in this bill, as of their own knowledge, are true, and those stated as of information from other sources, they believe to be true.

JAMES B. NICHOL.
JOHN NICHOL.

Subscribed and sworn to before me Aug. 18th, 1860.

JACOB McGAVOCK, *Clerk.*

Upon the back of said bill there is the following endorsement:

STATE OF TENNESSEE, *Sept. 6th.*

Let the process prayed for in this bill be granted on the execution of a bond for costs, satisfactory to the court, in the amount of five hundred dollars.

W. H. HUMPREYS, *U. S. D. Judge.*

Answer of L. J. Levy & Co., et als.

On the 1st day of April, 1861, the answer of L. J. Levy & Co., and the other defendants, was filed, which is in the words and figures following, to wit:

The circuit court of the United States for the middle district of Tennessee.

James Beal Nichol and John Nichol, citizens of Davidson County,
17 Tennessee, against Lyon J. Levy and Charles C. Guyon, partners, trading in the name of L. J. Lyon & Co., citizens of Pennsylvania; Thomas Wood, Edward L. Wood, and Horatio N. Carey, trading in the name of Thomas Wood & Co., citizens of Pennsylvania; William A. Everly and William E. Kain, trading in the name of William A. Everly & Co., citizens of Pennsylvania; William H. Inskup, Henry A. Shackleford, and John H. McKee, trading under the name of Inskup, Shackleford & McKee, citizens of Pennsylvania; Alexander T. Stewart, William H. Barrow, Francis Warder, and John F. King, trading in the firm name of A. T. Stewart & Co., of New York; Thomas C. Doremus and John M. Nixon, trading in the name of Doremus & Nixon, citizens of New York; John R. Jaffray, Authur W. Jaffray, and Edward S. Jaffray, trading in the name of J. R. Jaffray & Co., citizens of New York; James Watson and Joseph H. Hildeburn, trading in the name of Watson & Hildeburn, citizens of Pennsylvania; Edward or Elsworth Cheseborough, Ezra M. Kingsley, and Thomas G. Stearnes, trading in the name of Cheseborough, Stearnes, & Co., citizens of New York; Charles D. Carleton and Abraham R. Frothingham, trading in the name of Carleton & Frothingham, citizens of New York; John M. Odenheimer, James Tennent, S. B. Dickenson, John
W. Gellen, John C. Peason, S. B. Barber, and F. Campbell, trad-
18 ing in the name of Odenheimer & Tennant, citizens of Pennsylvania; all the foregoing creditors of James Beal Nichol. William H. Inskup, Henry A. Shackleford, and John H. McKee, trading in the name of Inskup, Shackleford & McKee, citizens of Pennsylvania; Samuel Cochran, Charles P. Cochran, Thomas Cochran, and William Barbour, trading in the name of Samuel Cochran & Co., citizens of New York; the two latter firms creditors of James B. and John Nichols, jr. William A. Everly and William E. Kain, trading in the name of Wm. A. Everly & Co., citizens of Pennsylvania, the last creditors of John Nichol, junior, defendants.

And thereupon the said defendants answering say, they suppose it is true that complainants' grandfather, Beal Basley, conveyed to them by his last will and testament the tract of land referred to in their bill; that it is true that in 1847 complainants became embarrassed and insolvent, and that these respondents were among their creditors; that it is true that the said Beal Basley made a deed to John Nichol, senior, mentioned in the bill, in trust for certain uses and purposes in said deed particularly specified. A copy of said
deed will be produced at the hearing of this cause, and the court can
19 judge for itself of the true intent and meaning of said deed, and its legal effect. That they supposed the deed was voluntary, but as to the special motives of said Beal Basley in making the deed respondents can tell nothing.

That the filing of the bill in 1850 by Beal Basley, against John Nichol,

senior, John Nichol, junior, and James B. Nichol, the proceedings, the arbitration, and award are correctly set forth in the bill.

That the filing of the bill for partition by said Beal Basley, in 1851, with the proceedings had thereon, are correctly set forth in the bill.

That it is true that these respondents obtained judgments in this court against the complainants for the amounts and at the times set forth in the bill respectively; that the filing of the several bills in the chancery court at Nashville by these defendants, the consolidation, &c., are correctly set forth, but the transcript of the record filed with the bill and made a part thereof, is a true statement of the proceedings had in said causes, and reference is therefore hereby made to it for more specific information; that they suppose it is true that some sort of a partition of said lands was made, and probably part thereof sold to the parties mentioned, but of this respondents know nothing.

20 That it is true that Beal Basley departed this *this* life the 3d of May, 1860; that it is true that respondents caused executions to issue on their judgments as stated and placed in the hands of the marshal, who levied upon said lands and advertised them for sale.

Respondents insist that said lands are liable to them, and that they had the right to levy on them and have them sold to satisfy their said judgments.

Further answering they say that the said John Nichol, sr., departed this life several years ago, leaving the complainants, James Beal and John Nichol, jr., Lindsley Nichol, William Nichol, Samuel Nichol, Benjamin F. Nichol, Bradford Nichol, Elizabeth Nichol, and Louisa Nichol, his children and only heirs-at-law, and by the death of the said John Nichol, sr., the legal title to said lands descended to and was vested in said children, subject only to such trusts as were created by the said conveyance from Beal Basley to complainants, and the said proceedings before the said arbitrators and in the chancery court for partition. And by the death of the said Beal Basley the complainants certainly became the absolute legal and equitable owners of two ninths of said land, the legal title of the other seven ninths being in the other children of the said John Nichol, sr., in trust for complain-

21. ants, but being such trust or estate in complainants as renders the entire lands subject to respondents' executions and to be sold under their said levies, as they are advised and insist.

The said Beal Basley left at his death one child, Harding, wife of Thomas Harding; one grandchild by the name of Erwin, a son of the daughter of the said Beal Basley, whose name was Basley, afterwards intermarried with Hugh Erwin, and the complainants as his only heirs-at-law; that is, he only had three children, Mrs. Harding, Mrs. Erwin and Mrs. Nichol, wife of the said John Nichol, sr. Mrs. Harding is still living, but the other two daughters are dead, one of them leaving complainants as her only children and heirs-at-law, and the other leaving the said Erwin as her only child and heir. The other said children of John Nichol, sr., are the children of a second wife, who is in no way related to the said Beal Basley. In the lifetime of the said Beal Basley he made large advancements to his daughter, Mrs. Harding, and to Mrs. Erwin and her said son; much larger to each of them than he did to complainants, and if in any view of the case it should be considered that Basley died the owner of the lands in controversy, he died intestate as to them, and before his other heirs could

22 come in for any portion of them they would be compelled to bring in and account for their advancements, and these lands in this settlement would fall to complainants, and then they would not get an equal share or one third of the estate of said Basley.

F. B. FOGG,
G. M. FOGG, and
R. HOUSTON, *Sol's.*

Exhibit A in complainants' bill, endorsed, filed August 18th, 1864.

STATE OF TENNESSEE:

Be it remembered, that on the 22nd day of December, A. D. 1858, there was filed in the office of the clerk of the supreme court of our said State, at Nashville, a transcript of the record in the case of S. Cochran and others, vs. John Nichol, jr., and others, and which is in the words and figures following, to wit:

STATE OF TENNESSEE :

At a court of chancery, begun and held at Nashville, for the county of Davidson, on the first Monday, it being the first day of November, A. D. 1858, the following proceedings were had in the cause wherein Samuel Cochran and others are complainants, and John Nichol, jr., and others are de-
23 fendants.

Bill, filed August 11, 1864.

To the Hon. S. D. Frierson, chancellor, &c., holding the chancery court at Nashville for Davidson County:

The bill of complaint of Samuel Cochran, Charles P. Cochran, Thomas Cochran, and William Barbour, partners in trade under the style of Samuel Cochran & Co., citizens of the State of New York, who file this bill for the benefit of themselves, and of William H. Inskup, Henry A. Shackleford, and John H. McKee, partners in trade under the style of Inskup, Shackleford & McKee, citizens of Pennsylvania, against James B. Nichol, John Nichol, jr., William Nichol, Samuel Nichol, Beal .Basley, Bradford Nichol, Franklin Nichol, Louisa Nichol, and Elizabeth Nichol, the said Bradford, Benjamin Franklin, Louisa, and Elizabeth being infants under twenty-one years of age, and for whom Evelina Nichol is general guardian, and who are all resident citizens of Davidson County, humbly complaining, shew unto your honor, your orators, the said Samuel Cochran, Charles P. Cochran, Thomas Cochran, and William Barbour, that they obtained their judgment against the said James B. and John Nichol, jr., on the 26th of March, 1853, in the circuit court of the United
24 States for the middle district of Tennessee, at Nashville, for the sum of $2,048 18, and $24 68 cents costs of suit; that execution issued thereon on the day of , 185 , was placed in the hands of the marshal of said district and has by him been returned *nulla bona;* that the said William H. Inskup, Henry A. Shackleford, and John H. McKee recovered their judgment in the same court against said James B. and John Nichol, jr., on the eighth day of March, 1850, for $1,129 61, and $23 73 cents costs of suit; that execution was duly issued thereon on the day of , 1850, placed in the hands of said marshal, and has by him been returned *nulla bona;* that your orators know of no property of the said James B. and John Nichol, jr., or either of them, out of which any part of the judgment aforesaid can be made by process at law, and that your orators have no hope of realizing any part of their said debt unless it can be in the manner which they will now proceed to indicate.

Your orators would now proceed to show that on the 13th of October, 1849, said Beal Basley, the grandfather of the said James B. and John Nichol, jr., made and executed his deed, which is registered in the register's office of said Davidson County, in Book 12, pages 489 and 490, a copy whereof
25 is hereto annexed, marked A, and prayed to be taken as a part of this bill, whereby, as the court will perceive, in consideration of his love and affection for his said grandchildren, the said Beal Basley conveyed to John Nichol, sr., the father of the said James B. and John Nichol, jr., one or more large and valuable tracts of land situate in said Davidson County,

and more particularly described in said deed as follows, that is to say, all the land owned by the said Beal Basley lying north of the road leading from Nashville to Hyde's Ferry, known and designated as the "Hyde's Ferry road," being part of the tract on which said Beal Basley resides at this time, and for many years has resided, said part being bounded by said Hyde's Ferry road, by Cumberland River, and by the land of Owen; also one half of a tract of about seven hundred acres, owned by said Beal Basley, situate on Cumberland River, at the mouth of White's Creek, including the mouth of said creek, said half of said tract being the lower half, and separated from the other by a dividing line run by David Love, and being the same now occupied by a tenant placed on the same by James Beal Basley. Said deed also conveyed one third of all the slaves of which said Beal Basley might die possessed, together with all other property whatsomever devised or bequeathed to said James Beal Nichol and said John Nichol,
26 jr., by said Basley by his last will and testament before that time executed by him, or that might descend to them from him in case of intestacy; that said property was conveyed to said John Nichol, sr., and his heirs forever, on the following trusts: that said John Nichol, sr., would permit said Beal Basley to possess, use, and occupy the same for and during his natural life, for the sole and exclusive use of himself, said Beal Basley, and after his death to permit said James B. and John Nichol, jr., jointly or in severalty, according to any equal division that might thereafter be made between them, to have, possess, and use, occupy, and enjoy the same, and receive the rents, profits, and issues thereof, but so that neither the said property, nor the rents, issues, nor profits thereof, should ever be liable for any of the then existing debts or liabilities of said James B. and John Nichol, jr., or either of them, or to any incumberance, liability, or lein that they or either of them or their property were subject to at the date of said conveyance for such debts or contracts, or by any act, default, or transaction of their own, whereby they might attempt to make the same liable for such debts or contracts; and on the further trust that after the then existing debts and liabilities of said James B. and John Nichol, jr., should be extinguished and
27 they entirely discharged therefrom, then the said John Nichol, senior, should hold said property and every part thereof in trust, to convey the same to said James B. and John Nichol, jr., in fee, and absolutely either as tenants in common or in severalty, and in such manner as might be agreed on by and between said James B. and John Nichol, jr. Your orator would further show that some time after the execution of said deed of gift, to wit, on the day of , 18 , the said Beal Basley filed his bill in the honorable court against said John Nichol, sr., said James B. and John Nichol, jr., alleging that the same had been incorrectly drawn, and asking that the same might be reformed so as to express his true intentions; that during the pendency of said bill, on the 10th of April, 1851, the parties thereto agreed, and did submit the matters in controversy in said suit to the arbitration of John Marshall, F. B. Fogg, and Russell Houston, esq'rs, and agreed that their award should be made the judgment of said court; that on the 3rd of May, 1851, the said arbitrators submitted their written award to said court, whereby they awarded that it was the intention of said Beal Basley to convey to said John Nichol, senior, by his said deed of the
28 13th October, 1849, only an interest of one half of the land therein described, and that the drawing of said deed was so as to pass the entire interest in said tract of land was a mistake of fact on the part of said Basley, and that the same be reformed so as to express the true intent of said Basley. Whereupon on the day of June, 1851, said award was incorporated and made a part of the decree of this court in said cause, by which decree it was further ordered that said deed be so reformed and cor-

rected as to pass to said John Nichol, sr., his heirs, &c., upon the trusts contained in said Basley's deed to him, the fee simple interest in the one half of said tract of land, and that the defendants to said suit be perpetually enjoined from setting up claim to any larger interest therein than an undivided moiety. A copy of said decree is hereto annexed, marked Exhibit B, and prayed to be taken as a part of this bill. The same has been duly registered in the register's office of Davidson County, in Book No. 14, pages 608, 609, and 610. Your honor will perceive that although said deed was thus reformed, and made to express the true intent of said Basley, yet his interest in said land remained undivided still. Whereupon said Basley on the 29th Sept., 1851, filed his original bill in this court against said
29 John Nichol, sr., James B. and John Nichol, jr., setting forth the execution of said deed of gift, the action of the court aforesaid, and praying for a division of said land according to the terms of said decree. In pursuance whereof the court appointed commissioners to divide said land according to the prayer of the bill, who returned their written report to the court, which was adopted; that said commissioners upon survey thereof found said tract to contain 666¾ acres and divided the same into two parts, giving the metes and bounds, the one nearest to the city of Nashville containing 308⅜ acres and the other 358⅜ acres. And said commissioners also furnished as a part of their said report a plat of said tract thus divided, and allotted the portion or division nearest Nashville to the defendants to said bill, and the other division to said Basley. Whereupon on the 10th of May, 1852, the court decreed that the remainder interest in fee in said entire tract of 666¾ acres be divided according to said report, and that all title and interest of said John Nichol, sr., James B. and John Nichol, jr, in and to the said tract of 358⅜ acres be divested out of them and vested in said Basley and his heirs in severalty, and that all the
30 title and interest of said Basley, in and to the remainder interest of the said tract of 308⅜ acres be divested out of him and vested in said John Nichol, sr., and his heirs upon the trusts contained in said Basley's deed of 13 October, 1849, aforesaid. A copy of the decree, embracing said report, is herewith filed, marked C, and prayed to be taken as a part of this bill, and the same has been duly registered in the register's office of said Davidson County, in Book 16, pages 129 and 130. From the foregoing statement of facts your honor will perceive, as your orators are advised, that said James B. and John Nichol, jr., are invested with at least a remainder interest in fee in said tract of 308⅜ acres allotted to them as aforesaid; that the legal title to said tract being in said John Nichol, sr., or his heirs, the same is not subject to execution at law. Your orators would now state that the said John Nichol, sr., long since departed this life, to wit, on the day of , 185 , leaving him surviving the said James B. and John Nichol, jr., Lindsley Nichol, Willam, Samuel, Benjamin Franklin, Bradford, Elizabeth, and Louisa, his children and only heirs-at-law. The premises considered, and as they have no remedy at law, your orators pray your honors that the said James B. and John Nichol, jr., Lindsley Nichol,
31 William, Samuel, Benjamin Franklin, Bradford, Elizabeth, Louisa, and Beal Basley may be made parties defendant to this bill and required to answer the same fully on oath according to the rules of this court; that subpœna issue, directed, &c., commanding, &c., that said defendants and each of them be restrained from selling or otherwise disposing of said tract of 308⅜ acres or any part thereof, until the further order of this court; that at the final hearing the interest of John Nichol, jr., therein may be sold and the proceeds applied to the judgments hereinafter enumerated, and for such other and further relief as orators may be entitled to. And, as in duty bound, your orators will ever pray, &c.

JOHN A. & ROB'T H. McEWEN, *Sol's.*

Security.

I will be security for costs.

JOHN A. McEWEN.

Aff'd't as to non-residence of L. Nichol.

This day personally appeared before me, C. D. Brien, C. and M., &c., John A. McEwen, who made oath that the aforesaid Lindsley Nichol is a non-resident of the State of Tennessee.

JOHN A. McEWEN.

Sworn to and subscribed before me this Aug. 21st, 1854.

C. D. BRIEN, *C. & M.*,
Pr. C. E. DIGGINS, *D. C.*

Bill, filed August 11th, 1854.

To the Hon. S. D. Frierson, chancellor, &c., holding the chancery court at Nashville:

32 The bill of complaint of Samuel Cochran, Charles P. Cochran, Thomas Cochran, and William Barbour, partners in trade under the style of Samuel Cochran & Co, citizens of the State of New York, who file this bill for themselves and on behalf Thomas C. Doremus and John M. Nixon, partners in trade under the style of Doremus & Nixon, citizens of New York; William H. Inskup, Henry A. Shackleford, and John H. McKee, partners in trade, under the style of Inskup, Shackleford & McKee, citizens of Pennsylvania; Charles G. Carleton and Abram Frothingham, partners in trade, under the style of Carleton & Frothingham, citizens of New York; Ellsworth Cheesbrough, Ezra McKingsley, and Thomas G. Stearns, partners in trade, under the style of Cheesbrough, Stearns & Co., citizens of New York; James Watson and Joseph H. Hildeburn, partners in trade under the style of Watson & Hildeburn, citizens of Pennsylvania; and John R. Jaffray, Authur W. Jaffray, and Edward S. Jaffray, partners in trade, under the style of J. R. Jaffray & Sons, citizens of New York, filed against James B. Nichol, John Nichol, jr., Beal Basley, William Nichol, Samuel Nichol, Bradford Nichol, Benjamin Franklin Nichol, Louisa Nichol, and Elizabeth
33 Nichol, the said Bradford, Franklin, Louisa, and Elizabeth, being infants under twenty-one years of age, and for whom Evalina Nichol is the general guardian, and who are all resident citizens of Davidson County, Tennessee, humbly complaining, shew unto your honor your orators, Samuel Cochran, Charles P. Cochran, Thomas Cochran, and William Barbour, that they obtained their judgment against said James B. and John Nichol, jr., on the 26th March, 1853, in the circuit court of the United States for the middle district of Tennessee, at Nashville, for the sum of $2,048 18, and costs of suit amounting to $24 68; that execution issued thereon on the day of , 185 , was placed in the hands of the marshal of said district, and has by him been returned *nulla bonos;* that the said Doremus & Nixon obtained their judgment in the same court on the 26th of March, 1853, against said James B. for $1,115 55, and $31 83 costs of suit; that execution was duly issued thereon on the day of , 185 , and was placed in the hands of said marshal, and has by him been returned *nulla bona;* that said J. R. Jaffray & Sons recovered their judgment in the same court against said James B. on the 26th March, 1853, for $853 81 and $31 83 costs of suit; that exe-
34 cution duly issued thereon on the day of , 185 , placed in the hands of said marshall, and has by him been returned *nulla bona;* that the said Watson & Hildeburn recovered their judgment in the same court on

the 26th of March, 1853, for $1,342 43 and $31 68 costs of suit against said James B.; that execution was duly issued thereon on the day of , 1853, was placed in the hands of said marshal, and has by him been returned *nulla bona;* that the said Cheesbrough, Stearns & Co. recovered their judgment in said court against said James B. on the 28th March, 1853, for $662 29 and $31 68 costs of suit; that execution was duly issued thereon on the day of , 1853, was placed in the hands of said marshal, and has by him been returned *nulla bona;* that the said Carleton & Frothingham recovered their judgment against the said James B. in the same court on the 28th March, 1853, for $1,227 32 and $31 68 costs of suit; that execution was duly issued thereon on the day of , 1853, was placed in the hands of said marshal, and has been by him returned *nulla bona;* that the said Inskup, Shackleford & McKee recovered their judgment in the same court against the said James B. on the 8th March, 1850, for $781 58 and $19 73 costs of suit; that execution was duly issued thereon on the day of , 1850,
35 placed in the hands of the marshal of said district, and has by him been returned *nulla bona;* that said Inskup, Shackleford & McKee recovered their other judgment in the same court against the said James B. and John Nichol, jr., on the 8th day of March, 1850, for $1,129 61, and $23 73 costs of suit; that execution was duly issued thereon on the day of , 1850, placed in the hands of said marshal, and has by him been returned *nulla bona;* that your orators know of no property of the said James B. and John Nichol, jr., or either of them, out of which any part of the judgments aforesaid can be made by process at law, and that your orators have no hopes of realizing any part of their said debt unless it can be done in the manner which they will now proceed to indicate.

Your orators would now show that on the 13th October, 1849, said Beal Basley, the grandfather of said James B. and John Nichol, jr., made and executed his deed, which is registered in the register's office of said Davidson County, in Book 12, pages 489 and 490, a copy whereof is hereto annexed, marked A, and prayed to be taken as a part of this bill, whereby, as the court will perceive, in consideration of his love and affection for his said grandchildren, the said Beal Basley conveyed to John Nichol, sr., the
36 father of said James B. and John Nichol, jr., one or more large and valuable tracts of land situate in said Davidson County, and more particularly described in said deed as follows, that is to say, all the land owned by the said Beal Basley lying north of the road leading from Nashville to Hyde's Ferry, known and designated as the Hyde's Ferry road, being part of the tract on which said Beal Basley resides at this time, and for many years has resided, said part being bounded by said Hyde's Ferry road by Cumberland River and the lands of Owen. Also one half of a tract of about seven hundred acres, owned by said Beal Basley, situate on Cumberland River, at the mouth of White's Creek, including the mouth of said creek, said half of said tract being the lower half, and separated from the other by a dividing line run by David Love, and being the same now occupied by a tenant placed on the same by James Beal Basley. Said deed also conveyed one third of all the slaves of which the said Beal Basley might die possessed, together with all other property whatsoever devised or bequeathed to said James Beal Nichol and said John Nichol, jr., by said Basley by his last will and testament before that time executed by him, or that might descend to them from him in case of his intestacy; that said property was conveyed to said John Nichol, sr., and his heirs forever, on the following
37 trusts: That said John Nichol, sr., should permit said Beal Basley to possess, use, and occupy the same for and during his natural life for the sole and exclusive use of himself, said Beal Basley; and after his death to permit said James B. and John Nichol, jr., jointly or in severalty, accord

ing to any equal division that might thereafter be made between them, to have, possess, use, occupy, and enjoy the same and receive the rents, profits, and issues thereof, but so that neither the said property nor the rents, issues, nor profits thereof should be liable for any of the then existing debts or liabilities of said James B. and John Nichol, jr., or either of them, or to any incumbrance, liability, or lien that they or either of them or their property were subject to at the date of said conveyance for such debts or contracts or by any act, default, transaction of their own whereby they might attempt to make the same liable for such debts or contracts; and on the further trust that after the then existing debts and liabilities of said James B. and John Nichol, jr., should be extinguished and they entirely discharged therefrom then the said John Nichol, sr., should hold said property and every part thereof in trust to convey the same to said James B. and John Nichol, jr., in fee and absolutely either as tenants in common or in severalty and
38 in such manner as might be agreed on by and between said James B. and John Nichol, jr.

Your orators would further show that some time after the execution of said deed of gift, to wit, on the day of , 18 , the said Beal Basley filed his bill in this honorable court against said John Nichol, sr., said James B. and John Nichol, jr., alleging that the same had been incorrectly drawn and asking that the same might be reformed so as to expose his true intention; that during the pendency of said bill, on the 18th of April, 1851, the parties thereto agreed and did submit the matters in controversy in said suit to the arbitration of John Marshall, F. B. Fogg, and Russell Houston, esq'rs, and agreed that their award should be made the judgment of said court; that on the 3d day of May, 1851, the said arbitrators submitted their written award to said court, whereby they awarded that it was the intention of said Beal Basley to convey to said John Nichol, sr., by his said deed of 13th Oct., 1849, only an interest of one half of the lands therein described, and that the drawing of said deed so as to pass the entire interest in said tract of land was a mistake of fact on the part of said Basley, and that the same be reformed so as to express the true intent of said Basley. Where-
39 on the day of June, 1851, said award was incorporated and made a part of the decree of this court in said cause; by which decree it was further ordered that said deed be so reformed and corrected as to pass to said John Nichol, sr., his heirs, &c., upon the trusts contained in said Basley's deed to him, the fee simple interest in the one half of said tract of lands and that the defendants to said suit be perpetually enjoined from setting up claim to any larger interest therein than an undivided moiety. A copy of said decree is herewith annexed, marked Exhibit B, and is prayed to be taken as a part of this bill. The same has been duly registered in the register's office, in Davidson County, in Book 1 4, pages 608, 609, and 610.

Your honor will perceive that although said deed was thus reformed and made to express the true intent of said Basley, yet his interest in said land remained undivided still. Whereupon said Basley, on the 29th Sept., 1851, filed his original bill in this court against said John Nichol, sr., and James B. and John Nichol, jr., setting forth the execution of said deed of gift, the action of this court as aforesaid, and praying for a division of said land according to the terms of said decree. In pursuance whereof this court appointed commissioners to divide said land according to the prayer of
40 the bill, who returned their written report to the court, which was adopted; that said commissioners upon survey thereof found said tract to contain 666¾ acres, and divided the same into two parts, giving the metes and bounds, the one nearest the city of Nashville containing 308⅜ acres, and the other 358⅜ acres. And said commissioners also furnished as a part of their said report a plat of said tract thus divided, and allotted

the portion or division nearest Nashville to the defendants to said bill and the other division to said Basley. Whereupon on the 10th of May, 1852, the court decreed that the remainder interest in fee in said entire tract of 666¾ acres be divided according to said report, and that all the title and interest of said John Nichol, sr., James B. and John Nichol, jr., in and to said tract of 358⅜ acres be divested out of them and vested in said Basley and his heirs in severalty; and that all the title and interest of said Basley in and to the remainder interest of the said tract of 308⅜ acres be divested out of him and vested in said John Nichol, sr., and his heirs upon the trusts contained in said Basley's deed of 13th Oct., 1849, aforesaid. A copy of this decree, embracing said report, is herewith filed, marked C, and prayed
41 to be taken as a part of this bill, and the same has been duly registered in the register's office of said Davidson County, in Book 16, pages 129 and 130.

From the foregoing statement of facts your honor will readily perceive that said James B. and John Nichol, jr., are invested with at least a remainder interest in fee in said tract of 308⅜ acres allotted to them as aforesaid; that the legal title to said tract being in John Nichol, sr., or his heirs, the same is not subject to execution at law.

Your orators would now state that the said John Nichol, sr., long since departed this life, to wit, on the day of , 185 , leaving him surviving the said James B. and John Nichol, jr., Lindsley Nichol, William, Samuel, Benjamin Franklin, Bradford, Elizabeth, and Louisa, his children and only heirs-at-law.

The premises considered, and as they have no remedy at law, your orators pray your honor that the said James B. and John Nichol, jr., Lindsley Nichol, William, Samuel, Bradford, Benjamin Franklin, Elizabeth, Louisa, and Beal Basley may be made parties defendant to this bill, and required to answer the same fully on oath according to the rules of this court; that subpœna issue directed, &c., commanding, &c., that said defendants, and each of them, be restrained from selling or otherwise disposing of said tract of 308⅜
42 acres, or any part thereof, till the further order of this court; that at the final hearing that the interest of said James B. Nichol therein may be sold and the proceeds applied to the judgments hereinbefore enumerated, and for such other and further relief as your orators may be entitled to. And, as in duty bound, your orators will ever pray, &c.

JOHN A. & ROB'T H. McEWEN, *Sol's.*

Security.

I will be security for costs.

JOHN A. McEWEN.

Affid't as to non-residence of L. Nichol.

This day personally appeared before me, C. D. Brien, C. and M., &c., John A. McEwen, who made oath that the aforesaid Lindsley Nichol is a non-resident of Tennessee.

JOHN A. McEWEN.

Sworn to and subscribed before me this Aug. 21st, 1854.

C. D. BRIEN, *C. & M.*,
Per C. E. DIGGONS, *D. C.*

Exhibit A to bills, registered October 5th, 1849.

This indenture, made this 13th day of October, in the year of our Lord one thousand eight hundred and forty-nine, between Beal Basley of the one

part and John Nichol, sr., of the other part, both of Davidson County, in the State of Tennessee, witnesseth, that for and in consideration of the love and affection had and borne by the said Beal Basley for his grandsons,
43 James Beal Nichol and John Nichol, jr., sons of the said John Nichol, sr., he, the said Beal Basley, has given, granted, and conveyed, and by these presents does give, grant, and convey, unto the said John Nichol, sr., and his heirs, the following property, that is to say, all the land owned by said Beal Basley lying north of the road leading from Nashville to Hyde's Ferry, known and designated as the Hyde's Ferry road, being part of the tract on which said Beal Basley resides at this time, and for many years has resided, said part being bounded by said Hyde's Ferry road, by Cumberland River, and the lands of Owen; also one half of a tract of about seven hundred acres, owned by said Beal Basley, situate on the Cumberland River, at the mouth of White's Creek, including the mouth of said Creek, said half of said tract being the lower half and separated from the other by a dividing line run by David Love, and being the same now occupied by a tenant placed on the same by James Beal Basley. Also one third of all the slaves of whom the said Beal Basley may die possessed, also all other property whatsoever devised or bequeathed to the said James Beal Nichol and said John Nichol given by the said Beal Basley in and by his last will and testament heretofore executed or which may descend to them in case of his in-
44 testacy, partial or total. To have and to hold the said land, slaves, and other property herein given, granted, and conveyed, or intended so to be, to the said John Nichol, sr., and his heirs forever, in trust, nevertheless, for the following uses and purposes; that is to say, that the said John Nichol, sr., will permit the said Beal Basley to possess, use, and occupy the said lands, slaves, and other property for and during his natural life, and during said period for the sole and exclusive use of the said Beal Basley, and after his death that the said John Nichol, sr., will permit the said James Beal Nichol and John Nichol, jr., jointly or in severalty, according to any division, into two equal parts that may hereafter be made between them, to have, possess, use, occupy, and enjoy the said property, and receive the rents, issues, and profits thereof, so that neither the said property, nor the rents, issues, and profits thereof, shall ever be liable for any of the present now existing debts, whether due or not due, or now existing contracts of the said James B. Nichol or John Nichol, jr., or either of them, or to any incumbrance, liability, or lien that they or either of them or their property are now subject to for said debts or contracts, or by any acts, default, or transactions of
45 their own whereby they may attempt to make the same liable for said debts or contracts, and after the present debts and liabilities of the said James Beal Nichol and John Nichol, jr., shall have been extinguished and they entirely discharged therefrom, then the said John Nichol, sr., shall hold said property, and every part thereof, in trust, to convey the same to the said James Beal Nichol and John Nichol, jr., in fee and absolutely, either as tenants in common or in severalty, and in such manner as may be agreed on by and between the said James Beal Nichol and John Nichol, jr.

In testimony whereof, the said Beal Basley has hereunto subscribed his name and affixed his seal the day and year aforesaid.

[SEAL.] BEAL BASLEY.

The words "or which may descend in case of his intestacy, partial or total," preceding the habendum, and the words "and absolutely" interlined between the sixth and seventh lines from the bottom, and the word "on," in the 4th line from the bottom, interlined before signed.

Attest: E. A. RAWORTH.
R. J. MEIGS.

STATE OF TENNESSEE, *Davidson County:*

Personally appeared before me, Robert B. Castleman, clerk of the county court of said county, E. A. Raworth and R. J. Meigs, subscribing witnesses to the foregoing deed of trust, who, being first sworn, depose
46 and say that they are acquainted with Beal Basley, the bargainor, and that he acknowledged the same in their presence to be his act and deed on this day. Tax paid.

Witness my hand, at office, this 13th day of October, 1849.

R. B. CASTLEMAN.

Rec'd October 13, 1849, 3.44 o'clock p. m.

STATE OF TENNESSEE, *Davidson County:*

REGISTER'S OFFICE, *August 2nd*, 1854.

I, Phinehus Garrett, register for said county, do hereby certify that the foregoing is a true copy from the records of my office, Book No. 12, pages 489 and 490.

P. GARRETT, *Register*,
By R. C. COLLIER, *D. R.*

EXHIBIT B TO BILL.

Copy decree.

REGISTER'S OFFICE, *June* 23, 1851.

Be it remembered, that this cause came on for final hearing before the Hon. B. L. Ridley, chancellor, &c., upon the day of June, 1851, whereupon it appeared to the satisfaction of the court that the complainant and defendants, by agreement in writing, under seal, under date of April 10th, 1851, agreed and bound themselves to refer the adjustment and decision of all the matters in controversy in said cause, together with the disposition of the costs thereof, to the arbitration of certain persons therein named, whose award, or that of a majority of them, should be final as to the
47 matters involved therein, and should be entered as the judgment of the chancery court in said cause at the next term succeeding the award.

It further appearing to the satisfaction of the court that the arbitrators had made their award, under hand and seal setting forth the agreement of the parties therein, which award and agreement are in the words and figures following, to wit:

Whereas Beal Basley, John Nichol, sr., James Beal Nichol, and John Nichol, jr., on the 10th April, 1851, entered into an agreement in the words and figures following, that is to say:

In the chancery court at Nashville, No. 623, rule docket.

BEAL
vs.
JOHN NICHOL, SR., JAMES B. NICHOL, AND JOHN NICHOL, JR.

The undersigned, parties in the above case, have agreed and do hereby refer the adjustment and decision of all the matters in controversy in said case, together with the disposition of the costs thereof, to the arbitrament of John Marshall, of Williamson County, and F. B. Fogg and Russell Houston, of Davidson County, whose award, or that of a majority of them, if they do not agree in opinion, shall be entered as the judgment of the chancery

court in said cause at the next term succeeding the award, and shall be final as to the matters involved therein.

48 Witness our hands and seals.

April 10, 1851.

BEAL BASLEY. [SEAL.]
JAMES B. NICHOL. [SEAL.]
JOHN NICHOL, JR. [SEAL.]
JOHN NICHOL. [SEAL.]

Now, this instrument witnesseth, that said John Marshall, F. B. Fogg, and Russell Houston, the above-named arbitrators, on the 1st day of May, 1851, assumed to act under the above written agreement, and on the same day and ensuing days caused the said parties and their sol's to appear before them at the court-house in the city of Nashville, and thereupon the record in said cause was read and heard; the testimony of witnesses, as well on the part of the def'ts as the comp't, was received and heard; and thereupon argument was had by counsel on both sides, and upon consideration thereof the said arbitrators have agreed and found from the said record and proofs, that said Beal Basley, by his deed bearing date 13 Oct., '49, a copy of which is made an exhibit to comp'ts' bill in this cause, conveyed to the def't John Nichol, sr., his heirs, &c., upon the trusts therein specified, the entire interest, all the lands of said Beal Basley lying north of the road leading from Nashville to Hyde's Ferry, known and designated as the Hyde's Ferry road, being part of the tract on which the said Beal Basley resided at the

49 date of said deed and for many years had resided, said part being bounded by said Hyde's Ferry road, by Cumberland River, and by the lands of Owen. That said Beal Basley, on the 30th December, 1846, made and published a last will and testament, a copy of which is also made an exhibit to said bill, which was unrevoked and valid at the execution of said deeds; that said Beal Basley, by said will, devised the one half of the above-described tract of land, conveyed by said deed, to Elizabeth Harding for life, remainder to her children, and the other half to def'ts J. B. Nichol and John Nichol, jr, and he further devised that partition of said lands be made between the two families as nearly equal as could be done, having due regard for the value of each division; that said Basley, by two previous wills, one dated 8 Jan'y, 1843, and the other dated 15 Sept., 1842, had made the same disposition of said tract of land as now made by said will of 30th Dec., 1846; and that said Beal Basley's intention so to dispose of said tract originated previously to 1842, and continued upon the execution of said deed, and that there has been no evidence produced tending to show any change of said intention on the part of said Beal Basley up to the filing of the bill in

50 this cause, except what is furnished by the face of said deed; that in the autumn of the year 1849 the def'ts Jas. B. Nichol and John Nichol, jr., had become embarrassed by debts of insolvency, and that the said Beal Basley being apprised thereof, was desirous that the property which they should derive from him should be after his death enjoyed by them and should not be taken to pay their debts, and that the execution of said deed was the means used by him to effect this object, and he in point of fact intended said deed to operate as a deed as to said tract of land, and not as a will; that the execution of said deed was the voluntary act of said Beal Basley, unsolicited by any of the defendants and free from the suspicions of fraud or practice of any kind on the part of the def'ts; that the sole purpose of said Beal Basley in making said deed was to secure to the def'ts, Jas. B. and John, jr., by deed the property upon the trusts in said deed named, instead of securing the same property to them by will, as was done by said will of 30th Dec'r, 1846, and that he had in making said deed no intention or

purpose of giving or conveying to the upon the trusts aforesaid
51 a greater interest in said tract of land than was given said Jas. B. and John, jr., in and by said wills, but that he did intend thereby to convey upon said trust an interest of one half of said tract of land, and that the drawing of said deed in such form as to pass the entire interest in said tract of land upon the execution thereof was a mistake of fact on the part of comp't, which was not discovered until after the registration of the deed, and which ought in equity be corrected.

The said arbitrators do therefore decide and award that said deed be reformed and corrected in respect to the mistake aforesaid, so as to pass to the def't John Nichols, sr., his heirs, &c., the fee simple interest upon the trusts aforesaid in the one half of said tract of land only, instead of the entire interest therein, and that said def'ts be perpetually enjoined from setting up and obtaining, by suit or otherwise, under said deeds a greater interest than one undivided interest of one half therein; that the compl't pay all the costs of this cause except the costs of the def'ts' answer and witnesses, which the def'ts, Jas. B. and John, jr., will pay; costs of arbitration to be equally divided between compl't and def'ts, Jas. B. and John, jr.

In testimony whereof, the said John Marshall, F. B. Fogg, and
52 Russell Houston have hereunto set their hands and affixed their seals on the 3d day of May, A. D. 1851.

FRANCIS B. FOGG. [SEAL.]
JOHN MARSHALL. [SEAL.]
RUSSELL HOUSTON. [SEAL.]

And the court being of opinion that the award thus made is final and conclusive upon the parties, and that it should be made the judgment and decree of the court, it is therefore ordered, adjudged, and decreed accordingly; and in conformity with said award, it is further ordered, adjudged, and decreed that the deeds of compl't bearing date 13 Oct., 1849, a copy of which is made an exhibit to compl'ts' bill, conveying upon the trusts specified in said deed, the entire interest in all the lands of the said complainants lying north of the road leading from Nashville to Hyde's Ferry, known and designated as the Hyde's Ferry road, being part of the tract upon which the said Beal Basley resided at the date of said deeds, said part being bounded by said Hyde's Ferry road, by Cumberland River, and by the lands of Owen, be reformed and corrected so as to pass to the said John Nichols, sr., his heirs, &c., upon the trust in said deed mentioned, the fee simple interest in the one half of said tract of land only, instead of the entire interest therein.

It is further ordered, adjudged, and decreed that the defendants be perpetually enjoined from setting up or claiming, by suit or otherwise,
53 under said deed a greater interest than an undivided one half interest therein.

It is further ordered, adjudged, and decreed that all the right, title, claim, and interest of the said def'ts in the other undivided half interest be divested out of the said def'ts and vested in the said Beal Basley and his heirs forever.

And it is further ordered, adjudged, and decreed that the compl't pay all the costs of this cause except the costs of the def'ts answers and witnesses, which the def'ts, James B. and John Nichol, jr., will pay, for which execution may issue.

It being suggested to the court that the costs of arbitration, which the award directs to be paid equally by comp'ts and James B. and John Nichol, jr., amounts to $315, and that the compl't has paid the one half thereof, but that the said Jas. B. and John Nichol, jr., have not paid the other half, by consent it is ordered that they pay the one half of said sum to said arbitrators, for which execution may issue if required.

A true copy from the minutes.

J. B. WHITE, *C. & M.*

Rec'd Aug. 21, 1851, 9.54 o'clock a. m.

STATE OF TENNESSEE, *Davidson County:*

REGISTER'S OFFICE, *Aug. 2d*, 1854.

I, Phinehus Garrett, register for said county, do hereby certify that the foregoing is a true copy from the records of my office, Book No. 14,
54 pages 608, 609, and 610.

P. GARRETT, *Register,*
By R. C. COLLIER, *D. R.*

Decree.

Exhibit C to bill, registered June 18, 1852.

BEAL BASLEY
v.
JOHN NICHOL *et als.* } In chancery, at Nashville, May term, 1852.

This cause coming on further to be heard this 10th day of May, before the Hon. John S. Brien, chancellor, &c., upon the report of the commissioners made in pursuance of the decree rendered at the last term, which report is in the words and figures following, to wit:

Commissioners' report.

In obedience to the annexed order from the chancery court at Nashville, the undersigned being summoned by the sheriff of Davidson County, and duly sworn, after examining the lands mentioned in said order, are of the opinion that the survey made by John H. Joslin represents truly the said tract of land, and are of opinion that the division line run by said Joslin through said tract equally as regards acres does not divide the same equally in value, and are of opinion that 25 acres should be cut off the tract next Nashville and added to the lower half of said tract; beginning at the white oak corner between two springs and running northwardly to the river so as to include the above number of acres, and we assign the tract next Nashville,
55 to John Nichol and others, and the lower portion of the tract so divided to Beal Basley, the compl't, which said tracts are truly represented by the annexed plat made by said Joslin. All of which is respectfully submitted.

Witness our hands and seals the 12th day of Feb'y, 1852.

WILLIAM D. PHILLIPS. [SEAL.]
WM. B. EWING. [SEAL.]
H. W. McGAVOCK. [SEAL.]
JAS. L. EWING. [SEAL.]

[See diagram.]

Surveyor's certificate.

STATE OF TENNESSEE, *Davidson County:*

MARCH 22, 1852.

The above plat truly and correctly represents, by courses, and distances, and quantity, a tract of land in said county, on the waters of Cumberland River, immediately north of the old Hyde's Ferry road, surveyed
56 and divided by me by the request of Beal Basley. Given under my hand, day and date above written.

JOHN M. JOSLIN, *S. D. C.*

Which report being heard and understood and not excepted to, is ordered to be in all respects confirmed. And it appearing to the satisfaction of the court that the said tract of land has been laid off by John M. Joslin, surveyor of Davidson County, in conformity with the partition and allotment of the commissioners, a plat of which survey and division is above inserted; and it further appearing that the boundaries of the entire tract are as follows: Beginning at a stake in David McGavock's line and in the centre of the old road, and running thence north 270 west, 51 2-5 poles, to a cedar stake, McGavock's & Owen's corner; thence north 6′ west, 407 poles, to Cumberland River at low-water mark; thence down the meanders of the river at low-water mark, and passing the line of division between the two tracts as allotted by the commissioners at 104 6-10 poles, a sycamore marked on the bank as a corner, and contained in all 563 poles, to the Hyde's Ferry road; thence with the meanders of said road south 85° east, 12 poles; thence south 72° east, 28 poles; thence south 87° east, 58 poles; thence north 87¼° east, 48 poles; thence south 89° east, 63 poles, to the line of division, (which
57 line of division runs from said point north 237 poles to a large white oak between two springs, giving a spring to said tract; thence north 3½° west, 170 poles, to Cumberland River;) thence the corner of the old Hyde's Ferry road continues north 87½° east, 103 poles; thence north 84½° east, 45 poles, to the beginning. The entire tract containing 666¾ acres, and the two tracts into which the whole is divided, according to the allotment of the commissioners, containing respectively, the one next Nashville 308⅜ acres, and the other 358⅜ acres. It is therefore ordered, adjudged, and decreed, that the remainder interest in fee in the entire tract of 666¾ acres to be divided according to the report of the commissioners, and that all the right, title, claim, and interest of the defendants in and to the tract of land of 358⅜ acres, part of said tract of 666¾ acres, so laid off as aforesaid, be, and the same are hereby, divested out of the said defendants, and vested in the said Beal Basley and his heirs forever, in severalty, and that all the right, title, claim, and interest of the said compl't in and to the remainder interest of the tract of land of 308⅜ so laid off as aforesaid, be, and the same are hereby, divested out of the compl't and vested in the defendant John Nichol, sr., and his heirs, upon the same uses and trusts as he held the undivided
58 moiety of said remainder interest under the deeds of the said Beal Basley, bearing date 13th Oct., 1849, and registered in the register's office of Davidson County, in Book No. 12, pp. 489, 490, and the decree of this honorable court correcting and modifying said deed in certain particulars, made at the May term, 1851, and registered in the register's office of Davidson County.

It is further ordered that the costs of this cause be paid equally by the complainant and the defendants, for which execution may issue.

I, Jackson B. White, clerk and master of the chancery court at Nashville, do hereby certify that the foregoing is a true copy of a decree rendered at the May term, 1852, of said court, and entered in Minute Book B, pp. 543, 544, and 545.

In testimony whereof, I hereto set my hand and affix the seal of said court at office, June 17th, 1852.

[L. S.]

J. B. WHITE, *C. & M.*,
By C. D. BRIEN, *D. C.*

Rec'd June 17th, 1852, 4.5 o'clock p. m.

STATE OF TENNESSEE, *Davidson County:*

REGISTER'S OFFICE, *August* 2, 1854.

I, Phinehas Garrett, register for said county, do hereby certify that the fore-

going is a true copy from the records of my office, Book 16, pages 129 and 130. Process issued and returned, &c.

P. GARRETT, *Register*,
By R. C. COLLIER, *D. R.*

59 *Answer of J. B. & J. Nichol, jr.*

The answer of James B. Nichol and John Nichol, jr., to the bill of Samuel Cochran and others, filed against them and others at Nashville. Respondents, saving all just exceptions to said bill, for answer say: They admit that complainants obtained their judgments against them as stated in the said bill, and that the same remains unsatisfied. Respondents admit the execution of trust, of date of 13 Oct., 1849, by their grandfather, Beal Basley, to their father, John Nichol, sr., reserving a life estate for himself therein, and on his death in trust to permit respondents to have, possess, &c., the same and receive rents, issues, &c., but so that neither the said property nor rents, &c., should ever be liable for any of the existing debts or liabilities of respondents or either of them, or to any incumbrance, liability, or lein that resp't or either of them or their property were subject to at the date of said conveyance for such debts or contracts, or by any act, default, or transaction of their own whereby they might attempt to make the same liable for such debts or contracts; and in further trust, that after the then existing debts and liabilities of respondents should be extinguished and respondents entirely discharged therefrom, then said John Nichol, sr., should hold
60 said property and every part thereof in trust, to convey the same to respondents in fee absolutely; all of which will particularly appear from said deed, a copy of which will be produced on the hearing.

Respondents admit that proceedings such as stated in said bill was taken and had in reference to said deed, and such decree was made under said proceedings as is therein stated. Respondents also admit that proceedings were had for a division of said lands in said deed described, between their grandfather or in his name and themselves, and such decree was made as stated. Respondents also admit the death of their father, John Nichol, sr., leaving him surviving the children in said bill named. Respondents answering, further say that the debts on which complainants obtained their judgments as set forth in their bills, were debts existing at and before the date of said deed of trust to their said father, and formed a portion of their indebtedness at said date, and against which said deed intended to provide. That respondents had been engaged in the mercantile business some years previous to the execution of said deed of trust aforesaid, and failed, and were unable to discharge their debts and liabilities. It was their misfortune; their condition and circumstances were known to their grandfather,
61 and said deed was made in virtue of that condition, and his knowledge of the same. Respondents regretted and regret their inability to discharge their said liabilities, and hoped and hope yet to be able to discharge them. They gave up whatever they possessed towards payment of their debts. They had not forgotten their liabilities, and in fact by the aid of friends, hoped to be able and were considering and about to submit a proposition to all of their old creditors which they hoped might be satisfactory to them, and when said bill was served on them, were in the act of causing the same to be placed before them.

Respondents are advised and believe that said property in said deed may not be subjected to the payment of said debts, but submit said question to the honorable court, and having fully answered, &c.

R. J. MEIGS, TRIMBLE & BROWN, *Sol's.*
EWING & COOPER, *Sol's.*

Order to consolidate and leave to file amended bill.

SAMUEL COCHRAN *et als. vs.* JOHN NICHOL, JR., *et als.*
SAME *vs.* JAMES B. NICHOL *et als.*
LEVY & CO. *vs.* SAME.

Upon the application of Levy & Co. and other judgment creditors,
62 and the production of their bill of complaint, it is ordered that these suits be amended by making the other judgment creditors in said last-mentioned bill specified parties to these suits, subject to the rights of complainant, who have previously filed their bills and hereby acquired a preferrence; and as the same question is involved in all the suits, it is ordered that all the suits be consolidated and the answer of John Nichol, jr., and James B. Nichol filed in cause 1,215 be received as the answer in the other suits, and the causes tried together.

Bill of Levy & Co. et als.

To the honorable court of chancery at Nashville: Lyon J. Levy and Charles C. Guyon, merchants in company under the name and firm of L. J. Levy & Company, of Philadelphia, who sue as well for themselves as for the judgment creditors specified in the schedule hereto annexed, marked A, and prayed to be taken as a party of this bill, bring this their bill of complaint against James B. Nichol, John Nichol, jr., William Nichol, Samuel Nichol, Beal Basley, Bradford, Franklin, Lindsley, Louisa, and Elizabeth, and Evelina Nichol, guardian of the infants Bradford, Benjamin Franklin, Louisa, and Elizabeth, all of Davidson County.

63 Humbly complaining, show unto your honors your orators that at the several times specified in the schedule herewith filed, your orators and the other creditors therein stated recovered the judgments as therein stated in the circuit court of the United States for the district of Middle Tennessee, and in the circuit court of Davidson County against the said James B. and John Nichol, jr., either jointly or severally; upon all which judgments executions have issued and have been returned by the marshall and sheriff respectively, "no property found;" copies of which judgments and executions will be produced as the hon. court may require. Said judgments being in full force and unsatisfied. And your orators know of no property in Davidson County or elsewhere belonging to the said James B. and John, or either of them, except the tract of land conveyed to John Nichol, senior, by Beal Basley, registered on the 14th October, 1849, in the register's office of Davidson County. The debts upon which said judgments were founded were due or in existence on the 13th October, 1849, when said deed of gift or trust was executed. And said deed is an exhibit to the bills of Samuel Cochran and others against John Nichol, jr., and others,
64 Nos. 1,215 and 1,217 on the Rule Docket in this court. And your orators pray that the said James B. Nichol and John Nichol, jr., and the heirs of John Nichol, the trustee, whose names are hereinbefore mentioned, may be made defendants to this bill, and that this cause may be consolidated and tried with the two suits before mentioned, and that the answers in that cause may be allowed as an answer to this bill, and that the said lands may be sold, and after satisfying the previous liens that the debts and interest due to your orators and the other creditors may be paid and satisfied, and that all proper accounts be taken, and for further relief, may it please your honor to order writs of subpœna to issue, &c.

F. B. FOGG & G. M. FOGG, *Sols.*

Schedule A to Levy & Co.'s bill.

List of judgments obtained by Foster & Fogg as attorneys, in the circuit court of the United States for the Middle Tennessee district, on which execution have issued and been returned "no property found," against James B. Nichol.

Lyon J. Levy, Charles C Grugan, composing the firm of L. J. Levy & Co., judgment Sept. 8, 1849, $11,768 75; costs, $18 93.

65 Thomas Wood, Edw'd L. Wood, Horatio Carey, composing the firm of Thos. Wood & Co., judgment Sept. 8, 1849, for $2,672 36; costs, $18 93.

Edward L. Wood, Horatio Carey, Thos. S. Wood, composing the firm of Wood, Carey & Wood, judgment Sept. 8, 1849, for $526 25; costs, $18 93.

Wm. A. Everly, Wm. E. Kuen, composing the firm of Wm. A. Everly & Co., judgment Sept. 8, 1849, for $1,198 91; costs, $18 93.

Wm. H. Inskup, Henry A. Shackleford, John H. McKee, composing the firm of Inskup, Shackleford & McKee, judg't March 8, 1850, $781 58; costs, $19 73.

Alex'r T. Stewart, Wm. H. Burrows, Francis Warden, John F. King, composing the firm of A. T. Stewart & Co., judg't Mar. 8th, 1850, $731 68; costs, $19 73.

Judgments obtained by Foster & Fogg as attorneys, in the same court, on which executions has issued and been returned "no property found," against James B. and John Nichol, jr.

Wm. H. Inskup, Henry A. Shackleford, John H. McKee, composing the firm of Inskup, Shackleford & McKee, judg't Mar. 8, 1850, $1,129 61; costs, $23 73.

66 Judgments obtained by Foster & Fogg as attorneys, in the same court, on which execution has issued and been returned "no property found," against John Nichol, jr.

Wm. A. Everly, Wm. E. Kuen, composing the firm of Wm. A. Everly & Co., judg't Mar. 8, 1850, $938 54; costs, $19 73.

List of judgments obtained by Foster & Fogg as attorneys, in the circuit court of Tennessee for Davidson County, on which executions have issued and been returned "no property found," against James B. Nichol.

Morris L. Hallowell, James Fraquair, Joshua L. Hallowell, Authur W. Little, Thomas W. Sweeney, Enoch R. Hutchinson, composing the firm of M. L. Hallowell & Co., judg't Sept. 10, 1850, $347 09; costs, $10 94.

John Sibley, Albert Molten, Edw'd D. Woodruff, composing the firm of Sibley, Molten & Woodruff, judg't Sept. 10, 1850, $241 40; costs, $10 69.

Joseph Wood, jr., Garret V. Wilson, John Wilson, composing the firm of Wood & Wilsons, judg't Sept. 10, 1850, $425 22; costs, $10 69.

67 Judgments obtained by same, in same court, on which execution has issued and been returned "no property found," against James B. and John Nichol, jr.

John M. Atwood, John P. White, composing the firm of Atwood & Co., judg't Sept. 10, 1850, $64 61; costs, $11 94.

Judgments obtained by same, in same court, on which execution has issued and been returned "no property found," against John Nichol, jr.

Thomas Wood, Edw'd L. Wood, Horatio L. Carey, composing the firm of Thomas Wood & Co., judg't May 14, 1850, $551 26; costs, $9 69.

Fassett & Co. *v.* J. B. Nichol, judgment January 17, 1855, for $5,101 22; costs, $3 75.

Order to consolidate.—Order to guardian to answer.

SAMUEL COCHRAN *vs.* JOHN NICHOL *et als.*
SAMUEL COCHRAN *vs.* JAMES B. NICHOL *et als.*

These causes are consolidated by order of the court, and it is ordered that Evalina Nichol, guardian of the minor defendants, answer said bills for her wards by January rules, and the clerk and master will give her written notice of this order.

68 *Answer of Evalina Nichol, filed Nov.* 4, '58.

The joint and several answer of Franklin Nichol, Bradford Nichol, Elizabeth Nichol, and Louisa Nichol, intfants under the age of 21 years, by Evalina M. Nichol, their guardian, to the bills of complaint of Samuel Cochran, Levi & Co., and others against the said infants and the other heirs of John Nichol, deceased, pending in the chancery court of Davidson County. These defendants for answer say that they are infants under the age of 21 years, and know nothing of the matters stated in said bills, and pray that if they have any interest therein the same may be protected by this honorable court.

Nashville, Nov. 3, 1858.

EVALINA M. NICHOL,
Guardian for the above minor children.

Final decree, rendered Nov. term, 1858.

SAMUEL COCHRAN *et als. vs.* JAMES B. NICHOL *et als.*
LEVY & CO. *vs.* JOHN NICHOL, JR., *et als.*
} Two bills.

These causes having been consolidated, were heard together on this 10th day of Nov., 1858, before the Hon. S. D. Frierson, chancellor, &c., upon the original bills, the answers of John Nichol, jr., and James B. Nichol, and of the infant defendants by their general guardian, and order taking
69 the bill for confessed as to the other defendants, exhibits and proof, and argument of counsel on both sides, and it appearing to the satisfaction of the court that the complainants as judgment creditors of James B. Nichol and John Nichol, jr., are seeking to subject to the satisfaction of their judgments the interest of the said James B. and John in a tract of land of 308⅜, lying in Davidson County, near Nashville, and particularly set forth and described in the bill and the exhibits thereto. It further appearing that the interest thus sought to be subjected is held under the provisions of a deed made by Beal Basley, on the 13th of Oct., 1849, whereby he conveyed said land to John Nichols, jr., and his heirs forever, in trust, to permit the said Basley to possess, use, and occupy the said lands for his natural life, and after his death to permit the said James B. Nichol and John Nichol, jr., jointly or in severalty, according to any division into two equal parts that might hereafter be made between them, to have, possess, use, occupy, and enjoy the said property, and receive the rents, issues, and profits thereof, but so that neither the said property, nor the rents, issues, and profits thereof, shall ever be liable for any of the present now existing debts whether due or not due, or now existing contracts of
70 the same James Beal Nichol and John Nichol, jr., or either of them, or to any incumbrance, liability, or lien that they or either of them or their property are now subject to for said debts or contracts, or by any act, default, or transaction of their own whereby they may attempt to make the same liable for said debts or contracts, and after the present debts and liabilities of the said James Beal Nichol and John Nichol, jr., shall have been

extinguished and they entirely discharged therefrom, then the said John Nichol, sr., shall hold said property and every part thereof in trust, to convey the same to the said James Beal Nichol and John Nichol, jr., in fee and absolutely, either as tenants in common or in severalty, and in such manner as may be agreed upon by and between the said James Beal Nichol and the said John Nichol, jr. It further appearing that said complainants' said judgments are all reserved upon debt and claims in existence at and before the date of the said deed from Beal Basley, and the court being of opinion that the court of chancery, by its original jurisdiction, acts only in aid of a court of law to subject property to the satisfaction of judgment debts, and can only reach real property to which the judgment debtor is himself
71 entitled to call for the legal title. The court being further of opinion that the defendants, James Beal Nichol and John Nichol, jr., are not entitled under the provisions of the aforesaid deed to call for the legal title to the land in question until their every debts are extinguished and discharged, and that their creditors cannot do more than their judgment debtors could themselves do. The court being further of opinion that the grantor had the right to fix the terms or conditions upon which the vesting of the legal title should depend, and the *the* conditions of the deed in question are legal and proper, and such as a court of equity would not, outside of any statutory provision, set aside and annul. The court being further of opinion that the provisions of the said deed are within the perview and meaning of the act of 1832, and cannot be subjected by bill under that act. The court being consequently of opinion that the property in question cannot be subjected to the complainants' debts, either under the general jurisdiction of the court or by virtue of the provisions in the said act of the legislature. It is therefore ordered, adjudged, and decreed that the said several bills be dismissed with costs, for which executions may issue against the complainants
72 and John A. McEwen, security for the prosecution.

Appeal.

From this decree the complainants pray an appeal to the next term of the supreme court, at Nashville, to be held on the first Monday in December, which is granted, upon the said complainants giving bonds with good security for costs on or before the rule day in December next.

Appeal bond.

Know all men by these presents that we, Samuel Cochran and L. J. Levy, and G. M. Fogg, security, are held and firmly bound unto James Beal Nichol, and the other defendants to this suit, or their certain attorney, executors, administrators, or assigns, in the penal sum of five hundred dollars, for the true payment whereof we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this third day of December, 1858.

The condition of the above obligation is such that whereas the above bound Samuel Cochran and others, and L. J. Levy and others, have prayed and obtained an appeal in the nature of a writ of error from the chancery court of Davidson County to the supreme court of errors and appeals,
73 at Nashville, in the State of Tennessee, on a decree of said chancery court, rendered at the present November term thereof, in favor of the said defendants (dismissing the bill of Cochran and Levy) against the said Cochran and others and L. J. Levy and others: Now if the said Samuel Cochran, L. J. Levy shall well and truly prosecute said appeal with effect, or, in case they fail therein, pay and satisfy the whole costs which may be awarded against them for wrongfully prosecuting said appeal, and satisfy

the judgment of the supreme court therein, then the above obligation to be void; else, to remain in full force and effect.

SAM'L COCHRAN,
By G. M. FOGG, *his Att.*
L. J. LEVY,
By G. M. FOGG, *his Att.*
G. M. FOGG.

Bill of costs.

State tax, (Cochran *vs.* John Nichol, jr., and others)	$3 75
State tax, (Cochran *vs.* J. B. Nichol and others)	3 75
Clerk and master's fees:	
Bill	25
Aff't	25
Bond	25
Copy bill	2 50
S'p'a	75
Order	25
Pub. for non res	75
Answer of John Nichol	25
Set	10
Bill	25
Aff't	25
Bond	25
Copy bill	3 50
Order pub	1 00
S'p'a	75
Order to consolidate	25
Levy & Co.'s bill	25
Order	25
6 cont	1 50
Answer of E. Nichol *et als*	25
Pro conf. orders	1 00
Final decree	1 00
Order, appeal, and bond	75
Rules	1 50
Order	25
Ent. costs on docket (two)	1 00
Copy of	25
74 Transcript map and seal	17 10
R. Banner (paid clerk) 2 publications for L. Nichol	6 00
John K. Edmonson, D. sheriff, serving in two cases 9 spas and 1 copy each	13 25
	63 45

In chancery, at Nashville.

STATE OF TENNESSEE, *Davidson County:*

I, John E. Gleaves, clerk and master of the chancery court at Nashville, do hereby certify that the foregoing is a true and perfect transcript of the proceedings had in said court, in the case wherein Samuel Cochran and others are complainants and James B. and John Nichol, jr., are defendants, as the same remain of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of

said court, at office, in Nashville, this 1st day of December, A. D. 1858, and 83d year of American independence.

J. E. GLEAVES, *C. & M.*

STATE OF TENNESSEE:

Supreme court, December term, 1858. Present, Judges McKinney, Caruthers, and Wright.

75 *Decree.*

SAMUEL COCHRAN & Co., L. J. LEVY & Co., AND OTHERS
vs.
JAMES B. NICHOL, JOHN NICHOL, AND OTHERS.

Be it remembered, that this cause was heard on the 30th January, 1859, before the supreme court of the State of Tennessee, sitting at Nashville, on the transcript of the record from the chancery court, at Nashville, and it appearing that Beal Basley executed his deed of date 13 October, 1849, and thereby conveyed to John Nichol, sr., father of the defendants, James B. and John Nichol, jr., and his heirs forever a certain tract of land in Davidson County, near the city of Nashville, containing three hundred and eight acres and other property in the pleadings particularly described, in trust, to permit said Beal Basley to possess, use, and occupy said lands and other property for and during his natural life, and after his death to permit said James B. Nichol and John Nichol, jr., jointly or severally, according to any division into two equal parts that may thereafter be made between them, and to have possession, use, occupy, and enjoy said property and receive the rents, issues, and profits thereof, but so that neither the said property, nor the rents, issues, and profits thereof, shall ever be liable for any of the
76 present now existing debts, whether due or not due, or now existing contracts of said James B. Nichol and John Nichol, jr., or either of them, or to any incumbrance, liability, or lien that they or either of them or their property are now subject to for said debts or contracts, or by any act, default, or transaction of their own, whereby they may attempt to make the same liable for said debts or contracts, and after the present debts and liabilities of the said James B. Nichol and John Nichol, jr., shall have been extinguished and they entirely discharged therefrom, then the said John Nichol, sen'r, should hold said property and every part thereof in trust, to convey the same to the said James B. Nichol and John Nichol, jr., in fee and absolutely, either as tenants in common or in severalty, and in such manner as may be agreed upon by and between the said James B. Nichol and John Nichol.

It further appearing that all the debts of all the complainants were in existence at the date of the execution of said deed, and were subsequently reduced to judgment in the circuit court of the United States at Nashville, as specified and described their said bill, that said John Nichol, sr., has
77 departed this life, leaving the defendants as his heirs-at-law. And it being the opinion of this court that said property is not liable for said debts and judgments of complainants and that the same may not be subjected to the payment and satisfaction of said debts and judgments, it is ordered, adjudged, and decreed that the decree of the chancellor be, and is hereby, affirmed. It is further ordered that the costs of this cause in the chancery court and in this court be paid by def'ts, James B. Nichol and John Nichol, jr., into the office of the clerk and mastsr, on or before the 1st day of June, 1859, and if not so paid, the same be and remain charged on said property, and the same, or so much thereof as is necessary, be by the clerk and master sold, and the proceeds thereof be so applied.

STATE OF TENNESSEE:

I, James P. Clark, clerk of the supreme court of said State, at Nashville, do hereby certify that the foregoing is a full, true, and perfect copy of the record and proceedings had in said court in the case of Cochran *et als. vs.* John Nichol, jr., and others, as the same appear on file and on record
78 in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office, in Nashville, this 20th day of July, 1860, and 35th year of American independence.

[SEAL.]

JAS. P. CLARK, *Clerk*,
By JAS. V. SMITH, *D. C.*

On the 5th day of May, 1863, at the April term, 1863, the following rule was entered:

Order to the compl't to show cause why the bill should not be dismissed.

JAMES B. NICHOL AND JOHN NICHOL, JR.,
vs.
L. J. LEVY. } On the equity side.

It is ordered that the complainants show cause by the sixth day of the next term why the bill in this cause shall not be dismissed for want of prosecution, and that notice of this order issue.

Order on complainant set aside.

On the 6th day of November, 1863, at the October term of said court, the following entree is made:

JAMES B. NICHOL AND JOHN NICHOL, JR.,
v.
L. J. LEVY *et als.*

The rule granted upon the complainant is discharged by consent of defendants' solicitors, and for satisfactory reasons shown the court this cause is continued until next term.

79 *Nichol to Nichol, registered March* 11, 1861.

On the 12th day of November, 1864, a deed of partition was filed, which is in the words following, to wit:

This deed of partition, made and executed this 4th day of March, 1861, between James Beal Nichol, of the one part, and John Nichol, of the other part, witnesseth, that whereas the said James Beal Nichol and John Nichol are seized of and hold jointly a tract or parcel of land situated on the north side of the Hyde's Ferry turnpike road, about one mile in a northwest direction from Nashville, containing three hundred and eight and $\frac{3}{8}$ acres, as will more fully appear from the decree of the chancery court at Nashville, made on the 10th day of May, 1852, in the case of Beal Basley against John Nichol and others, No. 763 on the rule docket of said court, and registerd in the register's office of Davidson County, in Book No. 16, pages 129 and 130, to which reference is made for the boundaries and description of the land; and the said James Beal and John Nichol on the 4th day of June, 1860, had the said land surveyed and a portion of it subdivided into lots, for the purpose of selling the same; of which subdivision Mr. Thomas Deaderick purchased twenty-five acres; and numbers 2, 3, 4, and 5 were sold tc other persons, and Mr. E. C. Lesener purchased that numbered 6 to 14 on the accompanying plat of

said survey herewith filed and made a part of this deed; and the said
80 James Beal and John Nichol have mutually agreed to make partition of the remainder of said land and hold their respective moieties in severalty.

Now, in consideration of the premises the said James Beal and John Nichol do by these presents make a full, perfect, and absolute partition of the aforesaid parcel of land between them, the said James Beal Nichol and John Nichol, in two parts, to be divided in manner and form following, reference being had to the plat aforesaid, viz: That the said John Nichol, his heirs and assigns, shall have and enjoy the moiety as follows, four-fifths of an acre off of lot No. 1, being the same adjoining the half acre lot conveyed to John D. James, president of the Hyde's Ferry Turnpike Company, by Beal Basley aforesaid, by his deed, dated Oct. 25, 1853, and registered in the register's office of Davidson, in Book No. 24, page 363, (lot No. 15 containing 93 acres 25 poles, and lot No. 16 containing 29 acres,) as and for his full moiety of said land; and that the said James Beal Nichol, his heirs and assigns, shall have and enjoy his moiety as follows: Lot No. 17, containing 29 acres 46 poles; lot No. 18, containing $3\frac{3}{4}$ acres; lot No. 19, containing 3 acres 129 poles; and lot No. 20, containing 93 acres 25 poles, as his portion of said land; and the said John Nichol, in consideration of the premises, doth
81 hereby give, grant, assign, and confirm to the said James Beal Nichol, his heirs and assigns, the aforesaid moiety and all the interest and estate and right and title of him, the said John Nichol, in the said moiety; to have and to hold the same to the said James Beal Nichol, his heirs and assigns, forever.

And the said James Beal Nichol, in consideration of the premises, doth hereby give, grant, assign, and confirm to the said John Nichol, his heirs and assigns, the aforesaid moiety and all the interest and estate and right and title of him, the said James Beal Nichol, in the said moiety; to have and to hold the same to the said John Nichol, his heirs and assigns, forever.

And the said John Nichol, for himself, his heirs, executors, administrators, and assigns, doth covenant with the said James Beal Nichol, his heirs and assigns, that he and they shall and may forever have, occupy, and enjoy the aforesaid moiety free and discharged of all right, title, interest, or estate of him, the said John Nichol therein or thereto, and of all incumbrances upon the same done or suffered by him.

And the said James Beal Nichol, for himself, his heirs, executors, administrators, and assigns, doth covenant with the said John Nichol, his heirs and assigns, that he and they shall and may forever have, occupy, and
82 enjoy the aforesaid moiety free and discharged of all right, title, interest, or estate of him, the said James Beal Nichol, therein or thereto, and of all incumbrances upon the same done or suffered by him.

In testimony, we have hereunto affixed our hands and seals the day and year above written.

JAMES BEAL NICHOL. [SEAL.]
JOHN NICHOL. [SEAL.]

STATE OF TENNESSEE, *Davidson County:*

Personally appeared before me, F. R. Cheatham, clerk of the county court of said county, the above-named James Beal Nichol and John Nichol, the bargainors, with whom I am personally acquainted, and who acknowledged that they executed the annexed instrument for the purposes therein contained.

Witness my hand, at office, this 11th day of March, 1861.

F. R. CHEATHAM, *Clerk,*
By P. L. NICHOL, *D. C.*

Received Mar. 11th, 1861, at 9 o'clock a. m.

STATE OF TENNESSEE, *Davidson County:*

REGISTER'S OFFICE, *Nov.* 4, 1864.

I, C. W. Smith, register for said county, do hereby certify that the foregoing is a true copy from the records of my office, as the same appears in Book No. 31, page 603.

C. W. SMITH, *C. R.*

83 On the 12th day of November, 1864, a deed was filed, which is as follows, to wit:

Deed.

We, James B. Nichol and John Nichol, do hereby sell, transfer, and convey to E. C. Lesneur, his heirs and assigns, the following tract or lot of land in Davidson County, Tennessee, in the 13th civil district, and bounded as follows, to wit: Beginning at a stake in the center of Basley street at the intersection of A street, 40 feet north of the center of the Hyde's Ferry turnpike road, and runs thence north with the center of said Basley street fifteen hundred and seventy-nine (1,579) feet to a stake, the centre of E street; thence east with the center of E street five hundred and fourteen (514) feet to the eastern margin of Grove street; thence southeastwardly along the eastern margin of said Grove street to the center of A street; thence west with the center of A street eight hundred and eighty-seven (887) feet, to the beginning, containing 22 acres 159 square poles by survey, for the consideration of five thousand two hundred and eighty-one and 87½-100 dollars, payable as follows, to wit, one third due twelve months after date, one third due eighteen months after date, one third due two years after date, evidenced by three notes of said E. C. Lesneur, each for $1,760 63, this day executed and delivered to me, bearing interest from date, with O. S. Lesneur security
84 thereon, and to secure the payment of which a lien is hereby retained upon said lands. We do covenant with the said E. C. Lesneur that we are lawfully seized of said lands, have a good right to convey it, and that the same is unencumbered, and we warrant the title against all persons whatsoever, this the 25th day of April, 1860.

JAMES B. NICHOL. [SEAL.]
JOHN NICHOL.

STATE OF TENNESSEE, *Davidson County:*

Personally appeared before me, F. R. Cheatham, clerk of the county court of said county, the within-named James Beal Nichol and John Nichol, the bargainors, with whom I am personally acquainted, and who acknowledged that they executed the foregoining deed for the purposes therein contained.

Witness my hand, at office, this 27th day of April, 1860.

F. R. CHEATHAM, *Clerk,*
By B. L. NICHOL, *D. C.*

STATE OF TENNESSEE, *Davidson County:*

REGISTER'S OFFICE, *April* 27, 1860.

I, Phinehus Garrett, register for said county, do certify that the foregoing deed and certificate are registered in said office, in Book No. 30, page 564–5, that they were received this day at 3 o'clock p. m. and entered in note book 4, page 189.

PHINEHUS GARRETT.

85 On the 12th day of November, 1864, the following memorandum of deed was filed by consent of the parties in this cause.

Nichol to Deaderick.

Book No. 29, page 484, of register's office of Davidson County. J. B. and John Nichol to Thos. Deaderick, unencumbered, 25 acres, for $2,500 cash, July 30, 1859; title warranted against all persons whatsoever.

Nichol to Lesneur.

Book No. 30, page 564. J. B. and John Nichol to E. C. Lesneur, 22 acres 159 poles, for $5,281 87½, payable by three notes, of $1,760 63 each, at 12, 18, and 24 months from April 25, 1860; lien retained; unencumbered title warranted against all persons whatsoever.

Nichol to Mercier & Cottrell.

Book No. 30, page 580. J. B. and J. Nichol to Mercier & Cottrell, 2 acres 14 poles, for $755 67, payable in three notes, for $251 89 each, at 12, 18, and 24 months from April 25, 1860; lein retained; unencumbered title warranty in general.

86 *Nichol to Woods and wife.*

Book No. 30, page 580–1. J. B. and J. Nichol to Robt. R. Woods and wife, 1 acre 128 poles, for $720, payable by three notes, for $240 each, at 12, 18, and 24 months from 25th April, 1860; lein retained; unencumbered title; general warranty.

Book 30, p. 183. Aug. 30, 1860, to Ozaune 3 acres 73 poles, 1,440. J. B. N. to E. C. Lesner, 3¾ acres, $650, 16th Nov., 1861. Book 32, 259. J. N., January 1, 1862, 129 poles to U. Ozaune, 150. Book 33, p. 72, 102, 114, 117, 182, 192.

87 *Final decree, rendered November* 22, 1864.

JAMES B. NICHOL AND JOHN NICHOL, JR.,
vs.
L. J. LEVY AND OTHERS.

This cause came on to be heard this 22 day of November, 1864, before the Honorable Connally F. Trigg, judge, upon the bill, answer, and exhibits, and was argued by counsel, when it appeared to the court that the complainants on the 18th day of August, 1860, filed their bill to enjoin the defendants, their judgment creditors, from proceeding to sell the land levied upon by virtue of executions upon their judgments as specified in the pleadings, upon the ground that the defendants were estopped by the decree of the supreme court of Tennessee, rendered on the 30th January, 1859, which is exhibited with complainants' bill, and also, that the deed of Beal Basley of 13th October, 1849, had created a trust which prevented said land from being sold upon the judgments and executions of the defendants. It appeared to this court that the decree of said supreme court was founded upon bills filed in the chancery court at Nashville by the defendants on the 11th of August, 1854, against Beal Basley, then in full life, the children and heirs of John Nichol, senior, two of whom the complainants were, and the complainants as judgment debtors, asking the interposition of a
88 court of chancery to subject the interest of the complainants in said lands to satisfy the judgments and to be sold for that purpose under the decree of the court of chancery by virtue of the general jurisdiction of that court, or the power conferred upon that court by the act of assembly of the State of Tennessee passed in the year 1832, chapter 11. At the time of the filing of said bills in chancery in the State court and at the time of

the decree in the supreme court, the said Beal Basley was in full life, and the estate of the complainants was an equitable estate in remainder, the said Basley being entitled to the possession and rents and profits during his life. On the 3d day of May, 1860, the said Beal Basley departed this life. This court is of opinion and do declare, that the defendants are not estopped by said decree and judgment of the supreme court from proceeding to collect their judgments by levy of their executions upon said land, as the decree of said court may have been founded upon their opinion that a court of chancery had no power or would not exercise their jurisdiction to order a sale of the interest of complainants in the then existing condition of the title. It appeared to the court that just before and after the death
89 of Beal Basley the complainants took actual possession of the land, sold and conveyed portions of the same by deeds in fee simple, with covenants of general warranty, and afterwards made partition of the land by deed of partition, and exercised every act of complete, absolute, and uncontrolled ownership over said land; and this court is of opinion that whenever the control of the trust property is in the donee without limitation, the same will be made liable for his debts, notwithstanding restrictions against such liability may be thrown around it by the donors, and that terms of extension of the donee's creditors not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can tie the hands of the donor himself.

Decree.

It is therefore ordered, adjudged, and decreed that the injunction be dissolved; that the bill of complaint be dismissed, and the defendants have liberty to proceed with their judgments and executions as they may be advised, each party paying his own costs in this court; and the defendants in open court admitted that they would assert no claim as against bona fide purchasers who had received deeds from the complainants before the date of the levy of their executions; from all of which decree complainants pray
90 an appeal to the next term of the Supreme Court of the United States, which is granted upon their giving bond and security for costs and damages in the sum of one thousand dollars according to law, which bond has been executed and approved, and accepted by the court.

Appeal bond.

Know all men by these presents that we, James B. Nichol, John Nichol, jr., and John E. Bauman, are held and firmly bound unto L. J. Levy *et als.* in the just and full sum of one thousand dollars, to be paid to the said L. J. Levy *et als.*, their certain attorneys, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 22 day of November, A. D. eighteen hundred and sixty-four.

The condition of the above obligation is such that whereas the above bound James B. Nichol and John Nichol, jr., have applied for and obtained an appeal to the Supreme Court of the United States from a decree pronounced by the circuit court of the United States for the district of Middle Tennessee in a cause therein pending on the equity side of said court,
91 wherein the said James B. Nichol and John Nichol, jr., were complainants, and the said L. J. Levy & Co. were defendants, on the 22 day of November, 1864:

Now if the said James B. Nichol and John Nichol, junior, shall prosecute their said appeal with effect, or, in case of failure, shall pay and satisfy all

such damages and costs as shall be awarded against them, then this obligation to be void; otherwise, to remain in full force.

JAS. BEAL NICHOL. [SEAL.]
JOHN NICHOL, by J. B. N. [SEAL.]
JOHN E. BAUMAN. [SEAL.]

Approved. CONNALLY F. TRIGG, *Judge, &c.*

Bill of costs against complainants.

Jacob McGavock, former clerk's fees:

Filing bill, 10; filing Exhibit A, 10		$0 20
Certifying ditto, 15; cert. ditto, 15		30
1 copy bill, 32 folios, at 10 cents		3 20
Affidavit to bill, 15; oath to same, 10		25
E. R. Campbell, clerk's fees:		3 95
Docket fee, $2 00; filing 3 papers, 30; cert. of filing ditto, 45.	$2 75	
1 continuance, 15; entering ½ final decree, 7 folios, 52	67	
Drawing appeal bond, 3 folios, 45; filing same, 10	55	
Cert. on same, 15; making out transcript for Supreme Court, 229½ folios, at 10 cents, $22 95	23 10	
Certificate on ditto, 30; seal, 20; enrolling 189 folios for complainant, at 15 cents	28 85	
		55 92
Total		59 87

This amount paid by complainant this December 7th, 1864.

92 *Bill of costs against defendants.*

Jacob McGavock, former clerk's fees:

Filing answer, 10; certificate of filing same, 15		$0 25
Affidavit to answer, 15; oath, 10		25
1 rule on defendants, 10		10
E. R. Campbell, clerk's fees:		60
½ cost of entering final decree, 7 folios, at 15 cents	$0 52	
Enrolling answer and ½ of said decree, 23 folios, at 15 cents.	3 45	
		3 97
		4 57

UNITED STATES OF AMERICA, *Middle District of Tennessee:*

I, Edward R. Campbell, clerk of the circuit court of the United States, in the sixth circuit, for said district, do hereby certify that the foregoing (92 pages) is a full, true, and perfect copy of the record and proceedings had in said court, in the cause of James B. and John Nichol, jr., *vs.* L. J. Levy *et als.*, as the same appears on file and on record in my office.

In testimony whereof, I have hereunto set my hand and the seal of said court, at Nashville, this 7th day of December, 1864, and of our independence the 89th year.

E. R. CAMPBELL,
Clerk U. S. Circuit Court for the M. D. of Tenn.

Filed January 24, 1865.

SUPREME COURT UNITED STATES.

DECEMBER TERM, 1866.

JAMES B. & JOHN NICHOLS, JR., APPELLANTS,

vs.

LYON J. LEVY ET ALS, APPELLEES.

No. 156.

Brief for Appellees.

1. "Whatever the rights of complainants under the provisions of the deed, the Circuit Court should have retained the bill, decided all the questions involved, and made a decree upon the merits."

Complainant's brief, VI.

The complainants pray only for an injunction to restrain the sale. After this was denied and the petition dismissed, the complainants can ask for no further hearing or decree. If the respondents had prepared the way by cross bill and proper prayer for relief, a further hearing might have been had and a decree upon the merits. The decree was upon the merits of the case as presented by the complainants. They presented but one quesion, it was decided against them ; made but one prayer, it was denied.

2. "If the estate of appellants was liable to execution, that part of the land sold by them in April, 1860, before the executions issued, was not so liable, and relief should have been granted against the executions as to so much ; the decree should therefore be reversed."

Brief of appellants, V.

The respondents, in open court, admitted, that they would assert no claims against *bona fide* purchasers who had received deeds before the levy of the executions, *and this admission is made part of the decree.*

Record, p. 32.

3. *The decree of the Supreme Court of Tennessee is not an estoppel.*

[a.] The essential qualities of an estoppel are that the judgment shall be between the same parties, upon the same subject matter, and this must appear by the record, or be proved, and is not to be inferred by argument.

Duchess of Kington's case, 11 State Trials, 261.
Stark. Evid., 1 vol., pp. 256, 267.
Kitchen *vs.* Campbell, 2 Bl. Rep. 830. 3 Wilson, 308.
Martin *vs.* Kennedy, 2 Bos. and Pal. 70.
Robinson's case, 5 Rep. 32.
Outram *vs.* Morewood, 3 East. 346.
1 Greenleaf Evid., Sec. 528–30
C. and H. Notes, Phil. Evid., 121.
Harvey *vs.* Richards, 3 Gal. 229.
Smith *vs.* Sherwood, 4 Conn. 276.
Eastmann *vs.* Cooper, 15 Pickering, 279.
Spooner *vs.* Davis, 9 Ib. 148.
Wood *vs.* Jackson, 8 Wend., 10, 16, 31, 36.
Lawrence *vs.* Hunt, 10 Id., 80.
Constant *vs.* Feaks, 2 Edw'd, 330.
Maybee *vs.* Avery, 18 Johns. 352.
Dale *vs.* Roosevelt, 1 Paige, 35.
Gardner *vs.* Buckbee, 3 Cow. 120.
Burt *vs.* Sternburg, 4 Id., 559, 659.
Wash., Alex. & Georgetown Packet Co., *vs.* Sickles, 24 How. 344.
Same *vs.* Same, mss. opin., Nelson, J., Dec. term, '66.

[b.] The parties are not the same.

In that case several causes were consolidated, and if the decree is a bar, it is a bar only as to the parties to that suit. It was not a creditor's bill.

[c.] It was not on the same subject matter.

In those cases an effort was made by certain judgment creditors to create a lien in equity upon and subject to sale, certain property in which it was alleged the defendants had an equitable interest. The court decided in substance that they had no estate at *that time* cognizable in a court of equity.

It was a bare possibility. The donees took no interest *in presenti*. It was to depend on their surviving the donor. He reserved a life estate to himself, and after his death a use to the donees for their lives, to be enlarged upon a certain con-

tingency into a fee. It was a use for life limited upon a use for life and dependant on their surviving the donor. In was an interest too remote, depending on a possibility only, and did not vest any estate in the donee. It was not an estate or interest in the donees which could pass by assignment, whether voluntary or involuntary. It could not pass even by will, because no estate could arise on which the devise could operate.

Preston on Estates, 75.

4. There was no limitation over, nor reservation to the heirs of the donor. On the death of the donees before that of the donor, the whole estate legal and equitable would revert to the donor and his heirs by operation of law.

Preston on Estates, 118.

Such an estate or interest could not be assigned or transferred at common law by voluntary or involuntary act.

The Supreme Court therefore was right in the decision which it made in the *then* condition of the title.

5. *But on the death of the donor, the donees surviving, the interest of the donees becomes a vested interest, subject to the disposition of a Court of Equity and subject to execution at law.*

a. There is no question here of the effect of the statute of Tennessee creating a lien by judgment on equitable interest, upon compliance with certain pre-requisites as to the filing of the judgments.

b. The equitable interest of the judgment debtors was subject to seizure and sale under *fieri facias.*

Russell *vs.* Stinson, 3d Haywood 6, 57.
Code Tennessee, Sec. 2,984.
Shute *vs.* Yerger, 1 Yerger 1.
Vance *vs.* McMairy, 3 Id., 171–8.
Smitheal *vs.* Gray, 1 Humphrey 491–7.

c. If by the statutes of Tennessee a judgment does not bind equitable interests in real estate, unless a memorandum thereof be filed in register's office, and if the *lien* ceases unless bill in equity be filed within thirty days, &c., yet when execution *is levied*, it will hold equitable interest from date

of levy, though the levy dating back to rendition of judgment be lost by failure to file, &c.

d. If the equitable interests of the judgment debtors could not, by the statute of Tennessee, be subjected to levy and sale upon execution, nor at common law, yet the interests can be subjected to levy and sale under the statute of frauds of 29 Ch. 2, chap. 3, sec. 10, provided, there shall have been a seizin in the debtor.

2 Crabb on real property, p. 521, sec. 1726.
2 Bl Com., 337.
Lewin on trusts, 24 Law Lib., p. 267 top., 526 marg.
Ibid. 277 top., 546 marg.

This statute, of 29 Ch. 2, is still in force in Tennessee.

5 Geo., 2.
Shute *vs.* Yerger, 1 Yerger, 1.

e. This being a voluntary conveyance by the donor in trust for the donees to "have, possess, use, occupy and enjoy said property, and receive the rents issued and profits thereof," upon the termination of the life estate of the donor they beeame seized of the lands, and by virtue of statute of 29 Charles, 2, the same became liable to levy and sale upon execution.

f. The relation of the parties had changed. That which was before, a bare possibility, when the decree of the Supreme Court of the State was rendered, had ripened into a vested equity, an estate for life and a conditional fee.

g. Upon the death of the trustee, John Nichol, Sr., the legal title decended to his heirs; and these complainants, as his children, took at least two-ninths of the legal estate which was subject to levy and sale under execution.

h. The compainants are the only beneficiaries under the trust. By statutes of Tennessee they, and they alone, could make application for appointment of a new trustee on the death of the old one. Sec. 3663. They neglected so to do from 1854 to 1860, and from 1860 to the present time, elected to consider the trust as completed, entered into possession, occupied, sold and conveyed as owners, and can now take no

advantage or benefit from any failure in the performance of the trust.

2 Story Eq., sec. 977.
Foley *vs.* Burnell, 1 Bro. Chan. 246.

6. *It was an estate in fee.*

a. The condition annexed to the estate made it inalienable except on a contingency, which was too remote and uncertain and against public policy.

b. It was a contingency which not only might never happen, but which was so uncertain that it could not control the enjoyment and transferable character of the estate.

If the donees had died before the condition performed, that is before the debts were all paid, still it was the clear intent of the donor that the usufruct of the estate should descend to the heirs of the donee. Those heirs would therefore take by descent. This would bring them within the rule in Shelley's case andthe donees would take the fee.

If, however, in such event the estate would revert to the heirs of the donor, these appellants would take by descent their full portion of the estate.

In either event, and upon either construction of this deed the donees took an estate subject to the execution in this case.

c. There is no restraint of alienation in the deed of trust nor any limitation over to defeat the estate in the event of a conveyance by the *cestui que trust* before the payment of the debts provided against by the said deed. If then the *cestui que trust* had united with the trustee after the death of Beal Bosley in a conveyance of the property in fee, before execution levied, the purchaser would have taken unemcumbered title. It follows that the *cestui que trust* took the full interest and estate as the land, subject only to the outstanding legal title, and such estate and interest was necessarily subject to sale under execution.

d. Where a grant or devise is made of the rents, issues and profits of an estate, the legal estate being vested in a trustee, with a condition annexed, that they shall not be subject to present or future debts, whether the estate granted or devised

be an estate for life or in fee, the condition is void as against public policy.

2 Crabb on real property, p. 515.
2 Story Eq., 974.
Graves *vs.* Dolphin, 1 Simon, 66.
Mebane *vs.* Mebane, 4 Iredell, 131.
Bank of State *vs.* Forney, 2 Id., 181–4.
Snowden *vs.* Dales, 4 Simon, 524.
Foley *vs.* Burnell, 1 Bro. Chan., 277.
Brandon *vs.* Robinson, 18 Vesey, Jr., 429.
Piercey *vs.* Roberts, 1 Milne & Keen, 4.
Hallet *vs.* Thompson, 5 Paige, 586.
Dick *vs.* Pitchford, 2 Dev. & Batt., 484.
Mss. Opin. Judge Trigg in this case.

In all cases cited by counsel for appellants, it will be found there was a limitation over to some third party as remainderman, so that the fee was sought to be sold when the debtor had but a life estate.

7. This is not a special trust. The trustee is but the passive depository of the title. The only action required of him is the general one required in all trusts, that of conveying the title to the *cestui que trust*, upon the completion of the trust.

Lewin on Trusts, 24 Law Lib. 13.

He is to "*permit* the said James Beal Nichol and John Nichol, Jr. * * * * * * to have, possess, use, occupy and enjoy the said property, and reserve the rents, issues and profits thereof; but so that neither the property nor the rents, issues and profits, should ever be liable for the debts, &c., &c., of James B. & John Nichol, Jr. * * * * and when said debts should have been extinguished "then the said John Nichol, Sr., should hold the said property in trust *to convey* the same to James B. & John Nichol, Jr. * * * in such manner as might be *agreed upon* by and between the said *James B. & John Nichols, Jr.*"

The trustee had nothing to do but *hold* the legal title, *permit* the parties to occupy and when the trust was ended, *convey* the legal title to them in such manner as *they* might determine. A more passive trustee can hardly be conceived of.

CONCLUSION.

We respectfully submit that the decree of the Supreme Court of Tennessee was not an estoppel; that the complainants had, at that time, no such title as could be sold under execution at law, or by decree in equity; that upon the death of Beal Bosley, they acquired a life estate with a contingent fee; that this life estate can be sold under execution; that the appellants, being lawfully seized of these lands, by the terms of the deed of trust, after the death of the donor, their equitable interests might also be sold under execution, by virtue of the statute in force in Tennessee; that the trustee having died, the legal estate descended to his heirs, these appellants, and merged with the equitable one, and their refusal to appoint a new trustee, together with their taking possession and exercising acts of ownership on the lands, precludes *them* from denying the claims of their creditors; that the trust deed granted them an estate for life, with an estate in fee, on the condition that the lands be not subjected to their debts—and that this condition being void as against public policy—the condition fails, and the donors or appellants take the estate in fee without condition. In any view the decree of the Circuit Court should be affirmed, and the interests of the appellants, whatever it may be, subjected to sale for the benefit of their creditors, now of more than 17 years standing.

THOMAS WILSON,
JOSEPH H. BRADLEY,
Solicitors for Appellees.

In the Supreme Court of the United States.

NICHOL *et al.*, *vs.* LEVY *et al.*

No. 156.

BRIEF FOR APPELLANTS.

This is an appeal from the circuit court of the United States for the middle district of Tennessee.

In that court, on the 18th of August, 1860, these appellants filed a bill for an injunction to restrain the defendants from selling under executions at law against the complainants, certain lands in which the complainants were interested, on the ground that said lands were not liable to be sold to satisfy the judgments in question. The court refused to grant the injunction, and this appeal was taken.

The only questions made in the case are, first, whether the matter of the liability of said lands was not *res adjudicata* in favor of these appellants in a certain other proceeding hereinafter mentioned in which they were defendants; and second, as an original question, whether the complainants had any such estate in the lands as was liable to execution at law.

THE CASE.

The appellants were grandsons of one Beal Basley, and having been engaged in mercantile business, and failing therein, had become heavily, if not hopelessly, indebted. Their grandfather, Beal Basley, desiring to provide for these young men, but unwilling that his bounty should go simply to pay their debts, executed on the 13th of October, 1849, a deed, conveying certain lands, slaves, and personal property to one John Nichol, sr., upon the following trusts, that is to say, that the said trustee should permit the said Beal Basley to occupy, enjoy, and possess said lands, &c., during his life "and after his death * * * * should

permit the said James B. Nichol, and John Nichol, jr., jointly, or in severalty, according to any division into two equal parts that may hereafter be made between them, to have, possess, and occupy, and enjoy the said property, and receive the rents, issues, and profits thereof, *so that* neither the said property, nor the rents, issues, and profits thereof shall ever be liable for any of the *present, now existing* debts whether due or not due, or *now existing* contracts of the said James Beal Nichol, or John Nichol, jr., or either of them, or to any incumbrance, liability, or lien, that they, or either of them, or their property are *now* subject to for said debts or contracts; and *after the present* debts or liabilities of the said James Beal Nichol and John Nichol, jr., shall have been extinguished, and they entirely discharged therefrom, then the said John Nichol, sr., shall hold said property and every part thereof in trust to convey the same to the said James Beal Nichol and John Nichol, jr., in fee, and absolutely either as tenants in common or in severalty, and in such manner as may be agreed on by and between the said James Beal Nichol and John Nichol, jr." (Record, p. 15.)

A question arose between the grantor and grantees as to *what* lands were intended to be conveyed by this deed, and was settled in 1852 by a decree in equity. The proceedings occupy pages 16 to 20 of Record, but are not material to be noticed here.

Subsequently John Nichol, sr., the trustee, died, and the legal estate in the lands descended to his nine children, two of whom were these appellants, James B. and John Nichol, jr.

Subsequently, and during the lifetime of Beal Basley, about in August, 1854, certain creditors of John Nichol, jr., and certain creditors of the firm of James B. and John Nichol, jr., having obtained judgment in the United States circuit court upon debts existing while the said conveyance was made, filed bills against them, [redacted], in the chancery court for Davidson county, praying a sale of their interest in the lands so conveyed. (Rec., pp. 8, 11.) These suits were consolidated and tried together, (Rec., p. 22,) and the court being of opinion "that the property in question cannot be subjected to the complainant's debts," the bills were dismissed in November, 1858, (Rec., p. 25,) and on appeal to the supreme court of Tennessee the decree below was affirmed. (Rec., p. 28.)

In March, 1861, James B. and John Nichol, jr., made

partition of the land by deed, (Rec., p. 28,) and in April, 1860, sold portions of it. (Rec., pp. 30, 31.)

In May, 1860, Beal Bailey died, and immediately thereafter the judgment creditors above mentioned and some others, who had not joined in the former proceedings, caused executions to be levied upon the entire tract of land in question, and it was accordingly advertised for sale. Whereupon in August, 1860, the Nichol filed a bill in the United States circuit court for an injunction to prevent the sale, setting forth the proceedings hereinbefore mentioned by which they contended the creditors were estopped, and also relying upon the exemption of the property, according to the terms and conditions of the trust under which they held. Upon final hearing, November 25, 1864, the court being of opinion that the defendants were not estopped by the decree of the supreme court, and "that the terms of exclusion of the donees' creditors not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can in the hands of the donee himself," dissolved the injunction and dismissed the bill. (Rec. p. 32,) from which decree the appeal was taken to this court. (Rec. p. 32.)

POINTS FOR APPELLANTS.

I. *The decree of the supreme court of Tennessee estops the parties to the proceedings in which it was rendered, as to the matter in question.*

a. The subject-matter was the same in both cases. The only difference was that caused by the death of the tenant for life, Beal Bailey. When the decree was rendered, these appellants had a vested remainder in the lands, after the death of Beal Bailey. No change took place after this decree and before the executions were issued, except that by his death the remainder vested in possession. But his death did not change the case. A remainder is as much liable for the satisfaction of judgments as an estate in possession; for a legal estate in remainder may be sold under execution, and an equitable remainder may be subjected, by proceedings in equity, to be sold for debt.

b. The suit in the chancery court was between the same parties. It is true that not all the defendants in this cause were parties to the cause in the chancery court, (thirty of the the thirty-seven being parties, (but this latter suit was upon a creditor's bill, to which all had a right to be made parties upon motion, and are, consequently, bound by the decision. (1 Green. Ev., sec. 535, and cases cited.)

If this be not so, still those who were parties are bound.

c. The question before the chancery and supreme courts was expressly the question now presented—whether this specific land, or the estate of the appellants therein, was liable to be sold to satisfy judgments against the appellants. The only difference was that the appellants sought, in the former case, to have the sale made under a decree, in the latter, under execution. (See Record, pp. 26, 27.)

II. *If the appellees are not estopped, and the question* is to be *treated as an original one in this suit, we submit that the estate of the appellants in the lands was not subject to be taken in execution.*

a. On this question the decision of the supreme court of Tennessee, if not an estoppel, is a controlling authority, being a decision upon the construction of a statute of that State, and laying down a rule of real property therein.

b. The intent and legal effect of the deed was to vest the legal estate in the trustee until the debts of the *cestui que trust* should be paid, and upon the happening of that event to convey the lands to the *cestui que trust*, and in the mean time the lands should be enjoyed by those persons described in the deed. During the continuance of the trust it was made the duty of the trustee to protect the possession of the lands against a specified class of persons, and to defeat any attempt on the part of the *cestui que trust* to apply the property or its proceeds to a certain specified and prohibited object. It was clearly the requirement of the donor that the trustee should, in certain contingencies, interfere actively in the execution of his intentions—to eject, for instance, former creditors, to whom the *cestuis que trust* should have conveyed the land in satisfaction of a then existing debt, or even the purchasers who might buy at sheriff's sale, under the executions which it is now sought to enjoin. Moreover, the trustee was to ascertain when a certain event had occurred—the final extinguishment of certain debts of the *cestui que trust*—and upon the happening of that event he was to make a conveyance in one or the other of the two modes prescribed by the deed of gift. These provisions and conditions, *if valid*, constitute a *special trust.*

Lewin on Trusts, 21.
Hite on Trustees, 279.
Fletcher on Estates of Trustees, 10 Law L. 17 (?.)
Mott *vs.* Buxton, 7 Ves., 201.
Crabb on Real Property, 508–9.

c. These provisions and conditions were valid, and especi-

ally that providing for a future conveyance of the land.

As to liability for debts, see

Fisher *vs.* Taylor, 2 Rawle, 33.
Vaux *vs.* Park, 7 W. and S., 19.
Braman *vs.* Stiles, 2 Pick., 460.

As to future conveyance, see

Lewin on Trusts, 21.
2 Crabb's Real Property, 508, sec. 1707.
Mott *vs.* Buxton, 7 Ves., 201.
Bank *vs.* Forney, 2 Ired. Eq., 181.

d. It is only by the statute of frauds, section 10, that lands held in trust are made liable to execution.

4 Kent, 308, a.
Shute *vs.* Harder, 1 Yerger, 1.

e. This statute, however, applies only to fraudulent and erroneous trusts, when the *cestui que use* has the whole beneficial interest, and the trustee only the naked legal title.

Bogart *vs.* Perry, 6 Johns' Ch. Rep., 52.
Vaux *vs.* Park, 7 W. and S., 25.

f. The statute does not apply, unless the absolute interest is in the *cestui que use*, and he is entitled to call for the legal estate.

Davis *vs.* Garrett, 3 Ired., 459–465.
Braman *vs.* Stiles, 2 Pick., 460.
Doe *vs.* Greenhill, 4 B. and A., 684.
Harris *vs.* Barber, 4 Bing., 96.

g. The statute of Tennessee of October 18, 1832, does not enlarge the provisions of the statute of frauds, but confirms the construction here insisted upon.

Sess. Acts of 1832, p. 22.
Code of 1828, secs. 2980 to 2986, 4282 to 4286.

h. These positions do not conflict with the authorities which hold that all a debtor's property must be liable to his debts. But the remedy is in equity, where the interest of the debtor *under the trust* can be reached—not by execution at law, whereby the trust is destroyed.

Mebane *vs.* Mebane, 4 Ired. Eq., 131.
Dick *vs.* Pitchford, 1 Dev. and Bat. Eq., 480.
Story, Eq. Jur., 974, 974 a.

i. The trust in this case being executory, and the trusts imperfectly declared, equity will carry the intentions of the parties into effect.

2 Crabb's Real Property, 579, sec. 1808.

III. *The death of the trustee and the descent of the legal estate in two-ninths of the land to the* cestui que use *did not affect the*

case. There was no merger of the legal and equitable estates.

2 Crabb on Real Property, 676. 1059, 1060.
Bridges *vs.* Bridges, 3 Ves., 120.
Hill on Trustees, 252.

IV. *By the death of the donor* the cestuis que use *inherited from him no estate in the lands in question.*

Beal Baslev had three daughters and no sons, and his heirs at law were: first, one surviving daughter; second, one grandchild, son of a second daughter; and third, his two grandsons, the complainants, sons of a third daughter; and, if he had died intestate, these complainants would have inherited one-third of his lands.

There was no resulting trust in the donor in the land in question. The entire estate had passed from him, legal and equitable.

Hill on Trustees, 82.
2 Crabb on Real Property, 557.

V. *If the estate of the appellants in the land was liable to execution, that part of the land which was sold by them before the executions issued, was not so liable, and relief should have been granted against the executions as to so much; the decree should therefore be reversed.*

In case of a simple trust, liable to execution, the land is bound only from the time of the execution issued, not of judgment entered up.

Lewin on Trusts, 546.
4 Kent Com., 308, note a.
Hunt *vs.* Coles, Comyn R., 226.

VI. *Whatever were the rights of the complainants under the provisions of the deed, the circuit court should have retained the bill, decided all the questions involved, and made a decree upon the merits.*

It is the privilege of a trustee, in all cases of doubt and difficulty, to apply to the court for its assistance and protection, and especially when legal proceedings are commenced against him.

Hill on Trustees, chap. 4, p. 543, and cases cited.

At the time of these proceedings the trustee was dead, and the parties whom it was his duty to protect against any violation of the trust were entitled to ask the protection of the court, and could have made the heirs of the trustee parties; but such nominal parties are properly dispensed with.

Story, Eq. Pl., sec. 229.

CONCLUSIONS.

We submit that by the decree in the supreme court of Tennessee the subject of this controversy is *res judicata*.

If it were otherwise, the settlement made by the grandfather, Beal Basley, was a valid trust, and the interest of the *cestuis que use* not being liable to execution at law, the complainants below, the appellants here, were entitled to the relief prayed, in whole or in part, and consequently that the decree of the circuit court should be reversed.

J. M. CARLISLE,
JNO. D. McPHERSON,
for Appellants.

SUPREME COURT OF THE UNITED STATES.

No. 250.

THE STEAMER WILLIAM BAGALEY AND CARGO, JOSHUA BRAGDON, INTERVENOR AND CLAIMANT, APPELLANT,

vs.

THE UNITED STATES AND CAPTORS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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3 United States district court, eastern district of Louisiana.

THE UNITED STATES OF AMERICA
against
THE STEAMER WILLIAM BAGALEY, HER TACKLE, &C., AND CARGO. } Filed July 25th, 1862, in prize.

To the Honorable Edward H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The libel of information in prize filed herein by Rufus Waples, attorney of the United States for the eastern district of Louisiana, on behalf of said libellants and of the naval captors in interest, and in the name and behalf of the United States of America, respectfully represents:

First. That the steamer or vessel called the William Bagaley, with the goods, wares and merchandise laden therein, was captured as lawful prize on or about the eighteenth day of July, 1863, and by the United States sloop-of-war Ossipee, Captain John P. Gillis, United States navy, commanding.

Second. That the steamer or vessel called the Wm. Bagaley, with the goods, wares, and merchadise laden therein, were at the time of such capture and are now rightfully subject to such capture, and were and are lawful prize, and as such should be condemned and forfeited to the use of the libellants, as will more fully appear by the depositions, documents, report of the prize commissioners, &c., already filed and made part hereof.

Third. That the said steamer called the Wm. Bagaley, with the goods, wares, and merchandise laden therein, have been brought to the port of New Orleans, and are now at said port and within the jurisdiction of this honorable court.

Fourth. That by reason of the premises, the said steamer or vessel called the Wm. Bagaley, her tackle, apparel, and furniture, with the goods, wares, and merchandise laden therein, became and are liable to condemnation and forfeiture as lawful prize, and should be condemned and forfeited as lawful prize to the libellants.

That all and singular the premises are and were true, and within the jurisdiction of this honorable court; in attestation whereof the said attorney exhibits the said vessel's papers, and the documents, &c., found on board, together with the testimony of the witnesses, duly taken in preparatorio by the prize commissioners appointed by this honorable court, which are or will be duly filed in the registry of this court.

Wherefore the said attorney of the United States, on behalf of the said United States, prays the usual process and monition of this honorable court against the said steamer or vessel called the Wm. Bagaley, and her tackle, apparel, and furniture, and the goods, wares, and merchandise laden therein, in this behalf to be made, and that all persons interested in the said vessel and her cargo may be cited to answer in the premises; and that all due proceedings being had therein, this honorable court may be pleased to decree for the condemnation and forfeiture aforesaid, and that the said steamer William Bagaley, her tackle, apparel and furniture, with the goods, wares, and merchandise laden therein, may be condemned as lawful prize to the use of the said United States.

Dated New Orleans, July 25th, 1863.

(Signed) RUFUS WAPLES,
United States District Attorney, Eastern District of La.

Filed July 25th, 1863.

4 Let admiralty process issue as prayed for.
July 25th, 1863.
(Signed) ALFRED SHAW, *Clerk.*

5 The President of the United States of America to the marshal of the eastern district of Louisiana or to his lawful deputy, greeting:

You are hereby commanded forthwith to seize, and into your possession take, the steamer William Bagaley, her tackle, furniture, and cargo, now libelled by the United States for that the said steamer William Bagaley, her tackle, furniture, and cargo, was captured as lawful prize on or about the 18th July, 1863, by the U. S. sloop-of-war Ossipee, Capt. John P. Gillis, U. S. navy, commanding, for the causes set forth in the libel and report of the prize commissioner now on file in the district court of the United States for the eastern district of Louisiana; that you do cite and admonish the owner or owners, and all and every other person or persons having or pretending to have any right, title, or interest in or to the same, to be and appear before a district court of the United States for the district aforesaid, to be holden at the city of New Orleans, on or before the third Monday from the service hereof, to show cause, if any they have or can, why the said steamer William Bagaley, her tackle, furniture, and cargo, should not be condemned as prize, forfeited to the United States, sold, and the proceeds thereof distributed agreeably to the prayer of the libellant; and how you have executed this warrant that you make return according to law.

6 Witness the Honorable Edward H. Durell, judge of the said court, at New Orleans, this 25th day of July, 1863, and the 88th year of the independence of the United States.

[SEAL.] (Signed) ALFRED SHAW, *Clerk.*

Marshal's return, filed August 15th, 1863.

Received July 27th, 1863, and in obedience to the within ad. warrant, took possession of the property within described, and appointed I. Vanderhyde and Claason keepers thereon, and subsequently, (July 27,) appointed Robert Brown and Jeremiah Dennitt keepers thereon; served a copy of the libel and ad. warrant by handing a copy of the libel to G. Claason, a free person found on board, and a copy of the ad. warrant was nailed to the mast of said steamer, and published monition in the Era, a daily newspaper, printed and published in New Orleans, July 28th, 1863, and returnable 17th August, 1863. Days of publication, July 28, August 4, 11, 1863.

Returned this writ August 15th, 1863.

(Signed) JAMES GRAHAM, *U. S. Marshal.*

In the United States district court, eastern district of Louisiana.

UNITED STATES
vs.
STEAMER WM. BAGALEY, HER TACKLE, ETC., AND CARGO. } No. 7,630.

In obedience to an admiralty warrant to me directed in the above-entitled suit, I have seized and taken into my possession the steamer William Bagaley, her tackle, apparel, and furniture, and the goods, wares, and merchandise laden therein, now libeled by the United States, for the reasons assigned and set forth in the libel, now pending in the district court of the United States, and I do hereby cite and admonish the owner or owners thereof, and all and every person or persons having or pretending to have any right, title or interest in or to the same, to be and appear at a district court of the United States for the district aforesaid, to be holden at the city of New Orleans, on or before the third Monday from the date hereof, to show cause, if any they have or can, why the said steamer William Bagaley, her tackle, apparel, and furniture, with the goods, wares, and merchandise laden therein, should not be condemned as prize, forfeited to the United States, and be sold, agreeably to the prayer of the libelant.

United States Marshal's Office, New Orleans, 27th day of July, 1863.

JAS. GRAHAM, *U. S. Marshal.*

7 *Prize commissioner's report, &c., &c., filed July 25th, 1863.*

In the matter of the steamer Wm. Bagaley, her cargo, &c.

To the Honorable E. H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The undersigned, prize commissioner of your honorable court, respectfully reports: That on the 23d of July, 1863, he received notice from C. C. Bunker, acting master of the United States sloop-of-war Ossipee, and then acting as prize master of the steamer Wm. Bagaley and her cargo, that he had brought with him to this city the said steamer Wm. Bagaley, of 396 30-95 tons, and her cargo, as a prize of the U. S. sloop-of-war Ossipee; that said Wm. Bagaley, &c., had been captured on the night of the 18th July, 1863, at about 11 o'clock, about one hundred and eighty miles off Mobile Point, State of Alabama, in a southeast direction, and that he and a prize crew had been placed aboard by John P. Gillis, captain of the Ossipee, with directions to bring said prize into this port, and report her as required by the laws and usages in such cases observed, &c.

8 That I, the said prize commissioner, did seasonably receive from said C. C. Bunker, prize master, as aforesaid, all such papers, documents, and writings as were found on board the said captured steamer and having reference to or connection with said captured property, and which were in the possession, custody, or power of the captors; which documents were by me, commissioner, regularly marked and numbered, from one to seven, inclusive, and the said prize master made a deposition identifying said documents, and said documents were also identified by the captain of said steamer Wm. Bagaley, in his examination on the standing interrogatories. The said seven documents and the deposition of their identification are herewith transmitted to the court.

That on the same day, the 23d July, 1863, the said prize master produced to me the three witnesses captured on said steamer Wm. Bagaley, and who were examined on the standing interrogatories, namely:

1. Charles Frisk, captain and master of said prize, whom I examined the same day.

2. John Maury, the mate of said prize, whom I examined the next day, the 24th of July, 1863.

3. Thos. S. Russell, the engineer of said prize, whom I also examined on the 24th of July, 1863.

That I examined said three persons in preparatorio, upon the standing interrogatories which had been adopted by this honorable court, as the same are found in Upton's Work on Prize Courts, &c., page 479, third edition;

9 that said witnesses were examined separately, and not in presence of each other, and unattended by counsel, and in all respects according to law and the usages in prize causes, and after they had each taken the following oath, which I administered to them: "You shall true answer make to all such questions as shall be asked of you on these interrogatories, and therein you shall speak the truth, the whole truth, and nothing but the truth, so help you God." That I wrote down the answers of every witness separately to each interrogatory, as the same answers are now transmitted to your honorable court, and when the interrogatories had been answered, and the answers written out, the said answers were signed by said witnesses respectively.

That on the 24th of July, 1863, I proceeded aboard of said steamer Wm. Bagaley, and examined her condition, &c.; that I found that no bulk had been broken in the cargo under deck, and that none of the property originally captured had been secreted or carried away; that it is necessary to make an undelivery of the cargo, to ascertain its nature, quality, and exact quantity

&c.; that I sealed the hatches of said steamer, by placing seals thereon, so as to prevent said hatches, four in number, from being broken open.

That I took possession of said steamer and cargo, and turned over the same to Jas. Graham, esq., marshal of this court, who is to safely keep the same until the further order of this honorable court.

10 All of which, including the deposition of said Bunker, the seven documents by him identified, and the answers of the witnesses taken as above is now securely sealed with my seal, and is herewith respectfully submitted to your honorable court and deposited in its registry.

New Orleans, July 24th, 1863.

(Signed) MICHAEL HAHN, *Prize Commissioner.*

Deposition of prize master.

UNITED STATES OF AMERICA, *City of New Orleans:*

Be it known that on this twenty-third day of July, A. D. 1863, at the city of New Orleans, State of Louisiana, personally came and appeared before me, Michael Hahn, prize commissioner for the district court of the United States for the eastern district of Louisiana, C. C. Bunker, acting master of the U. S. sloop-of-war Ossipee, and now acting as prize master of the steamer Wm. Bagaley and cargo, who declared that he had been appointed prize master of said steamer by and received his instructions as such from

11 John P. Gillis, captain and senior officer of the U. S. S. Ossipee; that said steamer Wm. Bagaley and cargo, were captured off Mobile, Alabama, on the night of the 18th of July, 1863, at about 11 o'clock, about one hundred and seventy-six miles SE. or S. 34° E., from the anchorage of the said Ossipee, off Mobile; that a boat's crew or more men were put aboard of said Wm. Bagaley, by the commanding officer of the U. S. vessel-of-war De Soto, and the papers of said Wm. Bagaley, were at first taken by said officer, or by other officers of the De Soto, but subsequently turned over to Capt. Gillis, whose vessel had signalized and fired at said Wm. Bagaley, and caused her to stop, and consequently taken her as prize; that Capt. Gillis handed said papers to said Prize Master Bunker, to be delivered to me, the prize commissioner, which is accordingly done at the signing of these presents, which papers or documents, seven in number, thus found on board of said Wm. Bagaley were by me, commissioner, duly and regularly marked and numbered from one to seven, inclusive, and endorsed with the signatures of said Bunker, and of me, commissioner, to identify them herewith.

And the said C. C. Bunker, being duly sworn, doth depose and say that said documents and papers above referred to were delivered up to me, commissioner, as they were found or received, without fraud, subduc-

12 tion, or embezzlement.

And he doth further depose and say that if at any time hereafter, and before the final condemnation or acquittal of said Wm. Bagaley and cargo, any further or other papers relating to the said captured property shall be found or discovered, to the knowledge of this deponent, they shall also be delivered up or information thereof given to the commissioners or to the court.

(Signed) C. C. BUNKER, *Acting Master.*

Sworn to and subscribed before me this 23d July, 1863.

(Signed) MICHAEL HAHN, *Prize Commissioner.*

District court of the United States for the eastern district of Louisiana.

Deposition of Charles Frisk, master of the Wm. Bagaley, a witness produced sworn, and examined in preparatorio, on the 23d day of July, in the year 1863, at the office of Michael Hahn, prize commissioner, Camp street, New Orleans, on the standing interrogatories established by the district
13 court of the United States for the eastern district of Louisiana, the said witness having been produced for the purpose of such examination by C. C. Bunker, acting master of the United States sloop-of-war Ossipee, and prize master, in behalf of the captors of a certain ship or vessel called the steamship Wm. Bagaley.

1st. To the first interrogatory he answers: I am a native of Sweden. I reside at Mobile; have lived there since about 1845. I am a citizen of the Confederate States; had been a citizen of the United States before the secession of the State of Alabama. I am married, and my family resides at Mobile.

2. To the second interrogatory he answers: I was present when the steamer William Bagaley was being loaded, and was on board as captain when she was captured.

3. To the third interrogatory he answers: The seizure and capture was made about 230 miles from Mobile, in a SE. by S. direction, on Saturday night, at about 11 o'clock, the 18th of July, 1863. We were taken to the blockading fleet off Mobile Bar, and from there to New Orleans. The William Bagaley had no commission to make prizes. We were captured because we were caught running the blockade.

4. To the fourth interrogatory he answers: We sailed under the Confederate colors; we had no other colors on board.

14 5. To the fifth interrogatory he answers: No resistance was made to the capture. One gun was fired by the U. S. sloop-of-war Ossipee, as I believe and was told. We were brought to by the Ossipee when she fired the gun; she was the nearest vessel to us; but when I stopped, a boat's crew of the U. S. war vessel De Soto was the first to come aboard my steamer; I had, however, previously been hailed by the Ossipee. The De Soto and Kennebec, another U. S. war vessel, were near and in sight when we were hailed and stopped. I was taken aboard the De Soto, from thence to the Ossipee, and outside Mobile Bar I was again placed on board the Wm. Bagaley, and taken to this city. The Wm. Bagaley was and is a merchantman. The Ossipee is a U. S. war vessel, of about two hundred and fifty men, and about eleven large guns.

6. To the sixth interrogatory he answers: I suppose she had, as she was a U. S. war vessel. The captured steamer has never before been seized and condemned that I know of.

7. To the seventh interrogatory he answers: I was appointed cap-
15 tain of the Wm. Bagaley, by the trustees of the vessel, Joseph A. Murrall, Moses Warind, and Charles Walsh, of Mobile, at said city. I have known the Bagaley some four years. She was delivered to me by Captain Robert Otis.

8. To the eighth interrogatory he answers: She is over three hundred tons; she had, I think, twenty-nine men in her company besides myself. The crew list (No. three of the documents identified,) will show the exact number and give their names, also their places of birth, and of what country they are citizens or subjects. It shows that they are all citizens of the Confederate States, except one, who is a subject of the king of Hanover. One man whose name is on the list, John F. Bennfer, remained behind at Mobile. They came on board some a month and some a day before we started, all at Mobile. I hired and shipped them.

9. To the ninth interrogatory he answers: No, not that I know of. I did not have any interest, I was only captain.

10. To the tenth interrogatory he answers: I first saw the Bagaley about four years ago. She had no guns. The number of her men has been already stated. She is an American-built steamer. She has never been
16 called by any other name that I know of.

11. To the eleventh interrogatory he answers: To Havana. The voyage was to have commenced at Mobile, and ended there. She left Mobile on the seventeenth instant, with about 700 bales cotton, and about 3,300 staves, and some turpentine. The turpentine was thrown overboard when we were being chased, also two or three bales of cotton, and some fuel wood. Her cargo remained the same ever since, except what was thrown overboard. She received her cargo about five weeks ago. We first left Mobile with 824 bales cotton, but we got aground on Thursday night, and I threw over some 20 or 30 bales, and then went back to the city and landed about 96 bales, so that when we left on Friday we had about 700 bales or less. There was no contraband goods aboard, unless whiskey for the crew.

12. To the twelfth interrogatory he answers: The seven documents handed to the commissioner by the prize master, and identified, are the only papers which were on the Bagaley when she was captured.

13. To the thirteenth interrogatory he answers: I have already answered this.

14th. To the fourteenth interrogatory he answers: I don't know the owners of the Bagaley; I think there are a great many; I only treated
17 with the trustees; I think they reside in Mobile and thereabouts.

15. To the fifteenth interrogatory he answers: I don't know.

16. To the sixteenth interrogatory he answers: The consignee in Havana is Mr. Herrera. We never carry any papers to the consignee for fear of being captured. The consignee generally gets his papers through some other source. The papers already identified shows the exact quantity, &c., of goods shipped at Mobile.

17. To the seventeenth interrogatory he answers: Two bills of lading were signed; they were true and fair; rather they were duplicates of but one. One copy I lost in Mobile a month ago, and the other was probably sent to the shipper.

18. To the eighteenth interrogatory he answers: I produce the seven papers already identified, as the only ones I had on board connected with the vessel or cargo.

19. To the nineteenth interrogatory he answers: The time, place, and circumstances of the capture have already been stated. There was no charter-party.

20. To the twentieth interrogatory he answers: No papers were torn, destroyed, cancelled, or concealed, or any such attempts made.
18 21. To the twenty-first interrogatory he answers: Yes, we knew this all; I knew it about eighteen months, from newspapers, &c.

22. To the twenty-second interrogatory he answers: The port was under blockade by the United States when we attempted to get out.

23. To the twenty-third interrogatory he answers: No, only after the capture.

24. To the twenty-fourth interrogatory he answers: Yes, but only this last time when we attempted to steal out.

25. To the twenty-fifth interrogatory he answers: No, never before that I know of.

26. To the twenty-sixth interrogatory he answers: No, except in wages which I may lose.

27. To the twenty-seventh interrogatory he answers: No.

28. To the twenty-eighth interrogatory he answers: I suppose the cotton was shipped for the benefit of the owners in Mobile.

29. To the twenty-ninth interrogatory he answers: The merchandise was of the growth or produce of the State of Alabama, as I believe.

19 30. To the thirtieth interrogatory he answers: It was shipped from the wharf at Mobile.

31. To the thirty-first interrogatory he answers: No.

32. To the thirty-second interrogatory he answers: None.

33. To the thirty-third interrogatory he answers: Not in the hold, but some goods were thrown from the deck, as already mentioned.

34. To the thirty-fourth interrogatory he answers: None at all, only the crew.

35. To the thirty-fifth interrogatory he answers: The papers are all fair and true, and obtained as they show on their face.

36. To the thirty-sixth interrogatory he answers: Steering towards Havana we changed our course about six times after we were being pursued, in order to avoid capture.

37. To the thirty-seventh interrogatory he answers: Don't know.

38. To the thirty-eighth interrogatory he answers: We had no arms and contraband goods, except whiskey.

20 39. To the thirty-ninth interrogatory he answers: She was bound for Havana, as already fully stated.

40. To the fortieth interrogatory he answers: No, we had no convoy; I had instructions to escape the blockading vessels, but not to resist; these instructions were verbal.

41. To the forty first interrogatory he answers: No.

42. To the forty-second interrogatory he answers: No.

43. To the forty-thire interrogatory he answers: No.

(Signed) CHAS. FRISK.

Sworn to and subscribed before me this 23rd July, 1863.

(Signed) MICHAEL HAHN, *Prize Commissioner.*

21 District court of the United States for the eastern district of Louisiana.

Deposition of John Maury, mate of Wm. Bagaley, a witness produced, sworn, and examined in preparatorio, on the twenty-fourth day of July, 1863, at the office of Michael Hahn, prize commissioner, 92 Camp street, New Orleans, on the standing interrogatories established by the district court of the United States for the eastern district of Louisiana, the said witness having been produced for the purpose of such examination by C. C. Bunker, acting master of the United States sloop of-war Ossipee, and now acting as prize master, in behalf of the captors of a certain ship or vessel called the steamer Wm. Bagaley.

1. To the first interrogatory he answers: I am a native of Ireland. I reside in the State of Alabama, in the Confederate States; have resided there about nine years. I am a citizen of the Confederate States. I was formerly a citizen of the United States. I am married; my family resides at Mobile.

2. To the second interrogatory he answers: I was. They were first taken to the blockading fleet off Mobile, and then carried to New Orleans.

22 I was present when the Bagaley was loaded, and when she was captured.

3. To the third interrogatory he answers: About two hundred miles south of Pensacola, and off Mobile, between 11 and twelve o'clock p. m., on Saturday, the 18th July, 1863. The Bagaley had no commission to make prizes. We were captured for being engaged in an unlawful business, running the blockade, &c.

4. To the fourth interrogatory he answers: The Bagaley had a Confederate flag flying at Mobile before our departure, but I saw no flags at all on board afterwards.

5. To the 5th interrogatory he answers: No resistance at all was made to the capture. One gun was fired, I can't say by which vessel. We were captured by the Ossipee, but several others came up to us as soon as we stopped. We had been chased all day by the Kennebec, and when we were taken all three vessels of-war were near us. I do not remember the names of the others. I think they were the De Soto. The Bagaley is a merchant vessel. The Ossipee is a U. S. war vessel, of about 250 or 300 men, and a large number, 28 or 30 guns.

6. To the sixth interrogatory he answers: I suppose the Ossipee has a right to make captures or seizures, as she is a war vessel. The Bagaley has not yet been condemned.

23 7. To the seventh interrogatory he answers: The Wm. Bagaley was commanded by Capt. Charley Frisk. I think he was appointed by Capt. Otis, at Mobile. I have known Captain Frisk 8 or 9 years in Alabama. He resides there with his family. He was born in some part of Germany or Holland, or northern Europe. He is a citizen of Alabama, in the Confederate States. I have known the Wm. Bagaley nine or ten years.

8. To the eighth interrogatory he answers: I don't know her tonnage or burden. She had about 27 or 28 persons on board as her company. They belonged to almost all nations. The crew list will probably show each man's nationality. They were hired by the captain at Mobile. They came aboard at two different times. We shipped a crew a few weeks before we started, but we lost some of our men, and then shipped others in their places.

9. To the ninth interrogatory he answers: I belonged to the Bagaley as mate. Neither I nor any officer or member of the crew had any interest in the vessel or cargo.

10 To the tenth interrogatory he answers: The first time I saw the Bagaley she was at the New Basin, New Orleans, about nine or ten years. She carried no guns. She was built somewhere about Pittsburgh, up the river. She was never called by any other name that I know of.

24 11. To the eleventh interrogatory he answers: She was bound for Havana when she was captured. The voyage was to begin at Mobile and end there. When we left Mobile she had on board 824 bales of cotton, a few barrels of turpentine, and some staves, used as dunnage and fire-wood. We threw the turpentine, (except one barrel,) some cotton, and some wood overboard on Thursday, Friday, and Saturday, to enable us to escape if possible. These things had been put aboard about six weeks ago, when we commenced loading her. She had no goods contraband of war.

12. To the twelfth interrogatory he answers: I never saw any papers aboard, except the crew list. We hove to at Fort Morgan, and got a pilot there after leaving Mobile.

13. To the thirteenth interrogatory he answers: I have already answered this.

14. To the fourteenth interrogatory he answers: I do not know who are the owners of the Bagaley or cargo.

15. To the fifteenth interrogatory he answers: I don't know.

16. To the sixteenth interrogatory he answers: I don't know.

17. To the seventeenth interrogatory he answers: I don't know anything about this.

18. To the eighteenth interrogatory he answers: Not that I know of.

25 19. To the nineteenth interrogatory he answers: I don't know the longitude or latitude, and nothing about any charter-party.

20. To the twentieth interrogatory he answers: Not that I know of.

21. To the twenty-first interrogatory he answers: Yes; we knew there was a state of war, and a blockade. We learned this at Mobile from newspapers' talk, and seeing the blockading fleet.

22. To the twenty-second interrogatory he answers: The port of Mobile was blockaded by order of the government of the United States.

23. To the twenty-third interrogatory he answers: I don't know the officer who captured us, and came aboard; went down in the cabin before they went on board the war vessel.

24. To the twenty-fourth interrogatory he answers: Yes, I know such was the case.

25. To the twenty-fifth interrogatory he answers: Not that I know of.

26. To the twenty-sixth interrogatory he answers: Yes; a few bbls. of turpentine that belonged to me, and were thrown overboard; two barrels in number.

27. To the twenty-seventh interrogatory he answers: I don't know.

26 28. To the twenty-eighth interrogatory he answers: I don't know.

29. To the twenty-ninth interrogatory he answers: Of the Confederate States.

30. To the thirtieth interrogatory he answers: We took the cargo on the wharf at Mobile.

31. To the thirtieth interrogatory he answers: I don't know.

32. To the thirty-second interrogatory he answers: I do not know.

33. To the thirty-third interrogatory he answers: Only the deck load, which was almost entirely thrown overboard near Mobile and before our capture.

34. To the thirty-fourth interrogatory he answers: No.

35. To the thirty-fifth interrogatory he answers: I do not know any paper but the crew list, which was true and fair as I believe.

36. To the thirty-sixth interrogatory he answers: Towards Havana; we changed our course several times when we were pursued.

37. To the thirty-seventh interrogatory he answers: I don't know.

38. To the thirty-eighth interrogatory he answers: Nothing of this kind was aboard.

27 39. To the thirty-ninth interrogatory he answers: She was going to Havana with the cargo.

40. To the fortieth interrogatory he answers: None until she was captured.

41. To the forty-first interrogatory he answers: None.

42. To the forty-second interrogatory he answers: No.

43. To the forty-third interrogatory he answers: No, not that I know of.

(Signed) JOHN MAURY.

Sworn to and subscribed before me this 24th July, 1863.

(Signed) MICHAEL HAHN, *Prize Commissioner.*

28 District court of the United States for the eastern district of Louisiana.

Deposition of Thos. S. Russell, engineer of Wm. Bagaley, a witness produced, sworn, and examined in preparatorio, on the twenty-fourth day of July, 1863, at the office of Michael Hahn, prize commissioner, 92 Camp street, on the standing interrogatories established by the district court of the United States for the eastern district of Louisiana, the said witness having been produced for the purpose of such examination by C. C. Bunker, acting master of the U. S. sloop-of-war Ossipee, and now acting as prize master in behalf of the captors of a certain ship or vessel called the steamer Wm. Bagaley.

1. To the first interrogatory he answers: I am a native of Ohio. I reside

at Mobile, and have lived there since 1851. I am a citizen of the Confederate States. I am a married man, and my family resides at Mobile.

2. To the second interrogatory he answers: Yes, I was present.

3. To the third interrogatory he answers: We were captured about two hundred and thirty miles from Mobile Point, at 11¼ p. m.—I looked at
29 my watch—on Saturday, the 18th July, 1863. We were carried to New Orleans. We had no commission to make prizes.

4. To the fourth interrogatory he answers: We sailed under Confederate colors; we had no other colors that I know of.

5. To the fifth interrogatory he answers: No resistance was made; one gun was fired by the Ossipee, I think, and we came to; I think the Ossipee captured us, although the officer of the De Soto was the first man who boarded us; besides the Ossipee, the Kennebec was in sight before dark. When we were captured the De Soto also was near us. The Wm. Bagaley is a merchantman. The Ossipee is a U. S. sloop of war; I do not know her force.

6. To the sixth interrogatory he answers: I suppose she has.

7. To the seventh interrogatory he answers: The captain of the Wm. Bagaley was Charles Frisk. I have known the Bagaley about six years; she was built, I think, at Pittsburgh; I first saw her on the Alabama River; she never had any other name. I have known Captain Frisk about five or six years; he and his family reside at Mobile; he was born in Sweden; he is a citizen of the Confederate States.

8. To the eighth interrogatory he answers: The Bagaley is about
30 500 tons burthen; she had about 28 men aboard, officers and crew; they are from almost all nations; they all came aboard at Mobile at different times, and were hired by direction of the captain.

9. To the ninth interrogatory he answers: I belonged to the Bagaley as engineer; we had no interest that I know of, except six barrels of turpentine (five of which were thrown overboard) belonging to me.

10. To the tenth interrogatory he answers: The Bagaley never had any other name.

11. To the eleventh interrogatory he answers: She was bound to Havana. The voyage was to begin at Mobile and end at Mobile after going to Havana. The cargo captured was the same which was put aboard at Mobile from the wharf during the last six weeks. She had no goods aboard contraband of war.

12. To the twelfth interrogatory he answers: I don't know about the papers. We stopped only at Fort Morgan, after leaving Mobile, and before our capture. She had on board about 824 bales of cotton and some turpentine. Some cotton was thrown overboard before we were captured. We had been out from Mobile Point 23 hours before we were captured.

13. To the thirteenth interrogatory he answers: I have already answered this.

31 14. To the fourteenth interrogatory he answers: I do not know.

15. To the fifteenth interrogatory he answers: I do not know.

16. To the sixteenth interrogatory he answers: I have already given all the information on this subject I have.

17. To the seventeenth interrogatory he answers: I don't know.

18. To the eighteenth interrogatory he answers: No, none that I know of.

19. To the nineteenth interrogatory he answers: I have no information on this subject that I have not already given.

20. To the twentieth interrogatory he answers: I don't know; none were burnt, destroyed, cancelled, &c.

21. To the twenty-first interrogatory he answers: Yes, we knew all this; we learned all this at Mobile, in various ways.

22. To the twenty-second interrogatory he answers: No; we received no notice previous to capture from the navy officers.

23. To the twenty-third interrogatory he answers: No.

24. To the twenty-fourth interrogatory he answers: We intended to run the blockade and get to Havana.

32 25. To the twenty-fifth interrogatory he answers: No.

26. To the twenty-sixth interrogatory he answers: None but the turpentine.

27. To the twenty-seventh interrogatory he answers: Not that I know of.

28. To the twenty-eighth interrogatary he answers: I do not know.

29. To the twenty-ninth interrogatory he answers: Of the State of Alabama.

30. To the thirtieth interrogatory he answers: I have already answered this.

31. To the thirty-first interrogatory he answers: None that I know of.

32. To the thirty-second interrogatory he answers: None:

33. To the thirty-third interrogatory he answers: No, except that on deck, which was thrown overboard. The hatches have never been opened that I know of.

34. To the thirty-fourth interrogatory he answers: No, none.

33 35. To the thirty-fifth interrogatory he answers: I don't know.

36. To the thirty-sixth interrogatory he answers: We were steering towards Havana; we altered our course and tried to escape when we were being pursued.

37. To the thirty-seventh interrogatory he answers: I don't know.

38. To the thirty-eighth interrogatory he answers: None.

39. To the thirty-ninth interrogatory he answers: We were running the blockade and trying to go to Havana.

40. To the forty'th interrogatory he answers: No.

41. To the forty-first interrogatory he answers: No.

42. To the forty-second interrogatory he answers: No.

43. To the forty-third interrogatory he answers: No.

(Signed) THOMAS S. RUSSELL.

Sworn to and subscribed before me this 24th July, 1863.

(Signed) MICHAEL HAHN, *Prize Commissioner.*

34 *Documents, papers, and other writings captured on board steamer Wm. Bagaley, filed July 25th, 1864.*

Annexed to and made part of the manifest appears the following blank passport:

Don Ignacio de Eguileor, caballero de la real y distinguida orden de Carlos Tercero, de la de San Fernando de primera clare y otras varias condecoraciones, consul de su Majestad Catolica, para el Estado de Alabama, con residencia en Mobile.

No. Concedo libre y seguro pasaporte a ; natural de ; profesion ; estado para que pase a , donde debera presentar este para su refrendacion; y encargo en nombre de S. M. (Q. D. G.) a las autoridades competantes no le pongan impedimento alguno en su viaje sin fondado motivo.

Filiacion.—Edad, anos; estatura, ; pelo, ; ojos, ; barba, ; cara, ; color, .

Senas particulares firma del portador.

Dado en Mobila, a de , de mil ochocientos ciencuenta.

Endorsed: Vapor Confederado Wm. Bageley, ylust'o senor yntendente de haciendu, Habana.

No. one. July 23rd, 1863.

(Signed) C. C. BUNKER,
(Signed) M. HAHN, *Prize Com'r.*

35 *Report and manifest of the cargo laden at the port of Mobile, on board the steamer Wm. Bagaley, Charles Frisk master, bound for Havana, Cuba.*

Marks.	Num'rs.	Packages or articles in bulk.	Contents.	Value at the port of exportation.		
				Value of domestic produce or merchandise.	Value of foreign produce or merchandise.	Total am't.
Various...	949	Nine hundred and forty nine packages.	Cotton, 428,544 lbs.	$122,779 26	.....	$122,779 26
824 bales..	3,200	Three thousand two hundred pieces.	Staves.....	555 00	.....	555 00
						123,334 26
125½ bales	10	Ten barrels turpentine..	.....	.....	.....	600 00
949 p'kgs	.....	.....	.....	.....	.....	123,934 26

DISTRICT OF MOBILE:

I, Charles Frisk, master and commander of the st'r Wm. Bagaley, bound from the port of Mobile to Havana, do solemnly, sincerely, and truly swear that the manifest of the cargo on board the said steamer, now delivered by me to the collector of the district, and subscribed with my name, contains, according to the best of my knowledge and belief, a full, just, and true account of all the goods, wares, and merchandise, now actually laden on board the said vessel, and of the value thereof. And if any other goods, wares, or merchandise shall be laden on board the said steamer previous to her sailing, I will immediately report the same to the said collector. I do also swear that I verily believe the duties on all foreign merchandise therein specified have been paid or secured according to law, and that no part thereof is intended to be relanded within the Confederate States of America; and that if by distress or other unavoidable accident it should become necessary to reland the same, I will forthwith make a just and true report thereof to the collector of customs of the district within which such distress or accident may happen. And I further swear that the merchandise is intended to be exported to Havana, Cuba. So help me God.

CHARLES FRISK.

Sworn this 16th day of June, 1863, before me.

J. C. COLISSON, *D'y Collector.*

El infrasorito el consul de Espana en Mobila, certifico que los efectos anotados en este consulado haberse embarcado en el vapor Confederado Wm. Bageley, para tu Habana.

Mobila, Junio 16, 1863.

[SEAL.] ALONSO PERES.

No. one. July 23, 1863.

(Signed) C. C. BUNKER,
(Signed) M. HAHN, *Prize Com.*

36 *Manifest of all the goods, merchandise, and specie shipped by Jos. E. Murrell, on board the steamer Wm. Bagaley, whereof Chas. Frisk is master, bound for the port of Havana, in Cuba.*

Marks.	Num's.	Packages or articles in bulk.	Contents.	Value at the port of exportation.		
				Value of domestic produce or merchandise.	Value of domestic produce or merchandise.	Total am't.
Various..	949	Nine hundred and forty-nine bales and half bales.	Cotton, 428,544 lbs.	$122,779 26	.....	$122,779 26
824 bales.	3,200	Three thousand and two hundred pieces.	Staves.....	555 00	.....	555 00
						123,334 26
125½ b's..	10	Ten barrels turpentine...	.....	....	.....	600 00
949 p'kgs	.....	.....	.....	.....	....	123,934 26

DISTRICT OF MOBILE:

I, Jos. E. Murrell, do solemnly swear that all the above manifest contains a full, just, and true account of goods, wares, merchandise, and specie of every kind shipped by me on board the above-named vessel, and that the quantities and value of each article are truly stated according to their actual cost or the value which they truly bear in this port at this time; and further swear that the said merchandise is truly intended to be exported to Havana, Cuba. So help me God.

JOS. E. MURRELL.

Sworn this 16th day of June, 1863, before me.

J. C. COLSSON, *D'y Collector.*

Special manifest, outward; sold by J. K. Randall & Co.

El infrascrito, el consul de Espana en Mobila, certifico que los efectos anotados en el anterior manifiesto son los mismos que consta en este consulado haberse embarcado en el vapor Confederado Bagley, Capitan Frisk, para la Habana.

Mobila, Junio 16, 1863.

[SEAL.] ALONSO PERES.

No. two. July 23, 1863.

C. C. BUNKER,
M. HAHN, *Prize Com.*

Don Ignacio de Eguilleor, caballero de la real y distinguida orden de Carlos Tercero de la San Fernando de primera clare, y otras varias con decoraciones, consul de su Majestad Catolica, para el Estado de Alabama, con residencia en Mobila.

No. .—Concedo libre y seguro pasaporte a ; natural de ; profesion ; estado para que pasa a , donde debera presentar este para su refrendacion; y encargo en nombre de S. M. (Q. D. G.) a las autoridades competentes no le ponga impedimento alguno en su viaje, sin fundado motivo.

Filiacion.—Edad anos; estatura ; pelo ; ojos ; barba ; cara ; color .

Senas particulares, firma del portador.

Dado en Mobila, a de , de mil ochocientos cincuenta.

Endorsed: Vapor Confederado, Wm. Bageley. Senor adm'dor de la aduana Habana.

No. two. July 23, 1863.

M. HAHN,
C. C. BUNKER, *Prize Com'r.*

42 I, Chas. Frisk, do solemnly, sincerely, and truly swear that the within list contains of the crew of the st'r W. Bagaley, together with the places of their birth and residence, as far as I can ascertain the same, this 16 day of June, 1863. CHAS. FRISK.

Before me. J. C. COLLSSON, *D'y Coll'r.*

I do certify that the within is a true copy of the list of the crew of the st'r W. Bagaley, of Mobile, whereof Chs. Frisk is master, taken from the original on file in this office.

Given under my hand and seal of office, at the custom-house, this 16th day of June, in the year of our Lord 1863.

I do hereby further certify that the within-named persons, who compose the company of the above-mentioned steamer, whereof Chs. Frisk is at present master, have produced to me proof in the manner directed in the act entitled "An act for the relief and protection of American seamen," and pursuant to the said act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen.

I do hereby certify that the said persons are citizens of the .

Given under my hand and seal of office this 16th day of June, 1863.

[SEAL.] J. C. COLSSON, *Dep'y Coll'r.*

OFFICE PROVOST MARSHAL, *Mobile, June* 16, 1863.

Captain Frisk and the above-named crew of the steamer Bagaley having complied with all the military regulations governing vessels leaving this port, the said steamer Bagaley is authorized to enter upon her voyage for Havana, Cuba.

June 16th, 1863. G. M. PARKER, *P. Marshal.*

FRANK'N BUCHANAN, *Admiral, &c.*

43 *List of persons composing the crew of the steamer Bagaley, of Mobile, whereof is master Charles Frisk, bound for Havana, Cuba.*

Names.	Place of birth.	Place of residence.	Of what country citizens or subjects.	Description of their persons.			
				Aged.	Height.	C'mp'x-ion.	Hair.
John Murry	Ireland	Mobile	Confederate States	41	5 11¼	Dark	Dark
T. S. Russell	Ohio	do	do	37	5 8	do	do
John F. Baunfer	England	do	do	42	5 11	do	do
John Murphy	do	do	do	32	5 8	do	do
R. H. Snow	New Orleans	do	do	31	5 8½	do	do
George Strele	Mobile	do	do	28	5 8	do	do
R. C. Smith	Louisville	do	do	23	5 4	do	do
John Weterhouse	Manilla	do	do	40	5 4	do	do
John Jefferson	England	New Orleans	do	49	5 4	do	do
Pat. Kane	do	do	do	44	5 10	do	do
Peter Lawrance	Rostock	New Orleans	do	48	5 9	do	do
C. Dannesbourg	Prussia	Mobile	do	46	5 4	Light	Light
William Benger	Denmark	do	do	46	5 10	Dark	Dark
C. Saxtoeph	Denmark	do	do	45	5 8	do	do
Philip Denin	Ireland	do	do	46	5 11	do	do
E Fraiche	Ireland	do	do	42	5 9	do	do
John Mack	Ireland	do	do	45	5 8½	do	do
Wm. Atsugent	Ireland	do	do	47	5 9½	Light	Light
Michael Welsh	Ireland	do	do	49	5 0	do	do
J. N. Newell	Georgia	do	do	61	5 8	do	do
Jerom Raily	Georgia	do	do	40	5 6	do	do
Pat. Maloney	do	do	do	34	5 7	do	do
James Shannon	Philadelphia	do	do	41	5 6	Dark	Dark
John Dumas	Mobile	do	do	17	5 4	do	do
Henry Richards	Germany	do	Hanover	33	5 10	Light	Light
Peter McGlenn	Ireland	do	Confederate States	44	5 8	do	do
T. Finnagan	do	do	do	41	5 8	Dark	Dark
James Robertson	Sweden	do	do	51	5 9	do	do
Henry Jacobs	Germany	do	do	40	5 7	do	do

44 No. three. July 23, 1863. C. C. BUNKER,
M. HAHN, *Prize Com.*

45 These are to certify all whom it doth concern that Charles Frisk, master or commander of the st'r W. Bagaley, burthen 396 30-95 tons, or thereabouts, mounted with guns; navigated with 29 men; built and bound for Havana, Cuba; on board, cotton, staves, turpentine.

[SEAL.] J. C. COLSSON, *D'y Collector.*

Hath entered and cleared his vessel according to law.

Given under our hands and seals, at the custom-house of Mobile, this 16th day of June, 1863, and in the third year of the independence of the Confederate States.

General clearance.

No. four. July 23, 1863.

C. C. BUNKER,
M. HAHN, *Prize Com.*

46 El infrascrito, consul de S. M. Catolica en esta plaza y sus dependenias, &c., &c., certifico que la firma aparece al pie de la patente de sanidad de la vuelta es de J. C. Colsson, sub-administrador de este aduana, siendo la misma que usa en todos sus escritos y a la cual se da entera fey credito tanto en juicio como fuera de el. Tambien certifico que el cargamento de algodon, duelas y resina que lleva este buque es producto del pais, y que su tripulacion se compone treinta individuos; asi mismo certifico que este puerto se precave de otro cualquiera punto que pueda estar infestado. Y finalmente certifico; que esta ciudad y sus contornos se hallan libres de toda enferme dad contagiosa. Y para que conste, doy la presente firmada y sellada con el de este consulado, en Mobila, a 16 de Junio de 1863.

El consul de S. M. C.,

[SEAL.] ALONSO PERES.

No. five. July 23, 1863.

C. C. BUNKER,
M. HAHN, *Prize Com.*

47 DISTRICT OF MOBILE:

To all the faithful in Christ to whom these presence may come:

Whereas it is pious and just to bear witness of the truth, lest error and deceit overthrow it. And whereas the st'r W. Bagaley, of which Chs. Frisk, under God, is master, and now ready to depart from the port of Mobile, and if God please to sail for Havana and other places beyond sea, with thirty persons, including the master of the said : We therefore, to you all by the tenor of these presents, do make known that (praise to God the most high and good) no plague or any dangerous or contagious disease at present exists in said port.

Given under my hand and seal of office this 16th day of June, 1863, and in the third year of the independence of the Confederate States of America.

[SEAL.] J. C. COLSSON, *D'y Collector.*

No. five. July 23, 1863.

C. C. BUNKER,
M. HAHN, *Prize Com'r.*

48 CONFEDERATE STATES OF AMERICA:

No. 34. Permanent register of vessels. No. 34.

In pursuance of existing laws and an act of the Congress of the Confederate States of America, entitled "An act to provide for the registration of vessels owned in whole or in part by the citizens of the Confederate States," Moses Waring, of Mobile, State of Alabama, having taken or subscribed

the oath required by law, and having sworn that himself, Jos. E. Murrell, and Charles Walsh, trustees of association of stockholders, are the only owners of the ship or vessel called the W. Bagaley, of Mobile, whereof Chas. Frisk is at present master, and is a citizen of the Confederate States, as he hath sworn, and that the said ship or vessel was built at Bellevernon, State of Pennsyl'a, in the year 1854, as per enrolment No. 12, issued at this port the 3rd February, 1857, now surrendered, property having changed; and said enrolment having certified that the said ship or vessel has one deck and one mast, and that her length is one hundred and seventy-three feet; her breadth, thirty-two 9-12 feet; her depth, seven 6-12 feet, and that she measures
396 30-95 tons; that she is a steamer, has transom stern, paddle-
49 wheels, and plain head; and the said M. Waring having agreed to the description and admeasurement above specified, and sufficient security having been given according to law, the said steamer has been duly registered at the port of Mobile.

Given under my hand and seal, at the port of Mobile, the 16th day of June, one thousand eight hundred and sixty-three.

[SEAL.] J. C. COLSSON, *Deputy Collector.*
[SEAL.] RO. TYLER.

No. six. July 23, 1863. C. C. BUNKER,
M. HAHN, *Prize Com.*

50 *Shipping articles.*

No ardent spirits allowed on board.

CONFEDERATE STATES OF AMERICA:

It is agreed between the master and seamen or mariners of the steamer William Bagaley, of Mobile, whereof Charles Frisk is at present master, or whoever shall go for master, now bound from the port of Mobile to Havana, Isle of Cuba, and back to a port in the Confederate States of America, that in consideration of the monthly or other wages against each respective seaman or mariner's name hereunder set, they severally shall and will perform the above-mentioned voyage; and the said master doth hereby agree with or hire the said seamen or mariners for the said voyage, at such monthly wages or prices to be paid pursuant to this agreement and the laws of the Congress of the United States; and they, the said seamen or mariners, do severally hereby promise and oblige themselves to do their duty and obey the lawful commands of their officers on board the said vessel, or the boats thereunto belonging, as become good and faithful seamen or mariners; and at all places where the said vessel shall put in or anchor at during the said voyage, to do their best endeavors for the preservation of the said vessel and cargo, and not to neglect or
51 refuse doing their duty by day or night, nor shall go out of the said vessel on board any other vessel, or be on shore under any pretence whatsoever, until the above said voyage be ended and the said vessel be discharged of her loading, without leave first obtained of the captain or commanding officer on board; and in default thereof he or they shall be liable to all the penalties and forfeitures mentioned in the marine law, enacted for the government and regulation of seamen in the merchants' service, in which it is enacted "that if any seaman or mariner shall absent himself from on board the ship or vessel without leave of the master or officer commanding on board, and the mate or other officer having charge of the log-book shall make an entry therein of the name of such seaman or mariner on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall ab-

sent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owner or owners of the said ship or vessel, and, moreover, shall be liable to pay him or them all damages which he or they may sustain by being obliged to hire other
52 seamen or mariners in his or their place." And it is further agreed that in case of desertion, death, or impressment, the wages are to cease. And it is further agreed by both parties that each and every lawful command which the said master or officer shall think necessary hereafter to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, to be strictly complied with under the penalty of the person or persons disobeying forfeiting his or their whole wages or hire, together with everything belonging to him or them on board said vessel. And it is further agreed on that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at the last above mentioned port of discharge, and her cargo delivered. And it is hereby further agreed between the master, officers, and seamen of the said vessel that whatever apparel, furniture, and stores each of them may receive into their charge, belonging to the said vessel, shall be accounted for on her return, and in case anything shall be lost or damaged, through their carelessness or insufficiency, it shall be made good by such officer or seaman by whose means it may happen, to the master and owners of the said vessel. And whereas it is customary for the officers and seamen, while the vessel is in port, or whilst the cargo is delivering, to go on shore at night to sleep, greatly to the prejudice of such vessel and freighters, be it further
53 agreed by the said parties that neither officer or seaman shall, on any pretence whatever, be entitled to such indulgence, but shall do their duty by day in discharging of the cargo, and keep such watch by night as the master shall think necessary to order, relative to said vessel or cargo. And whereas it frequently happens that the owner of captain incurs expenses while in foreign port, relative to the imprisonment of one or more of his officers or crew, or in the attendance of nurses, or in the payment of board on shore, for the benefit of such person or persons: Now it is understood and agreed by the parties hereunto that all such expenditures as may be incurred by reason of the foregoing premises shall be charged to and deducted out of the wages of any officers or such one of the crew by whose means or for whose benefit the same shall have been paid. And whereas it often happen that part of the cargo is embezzled after being safely delivered into lighters, and as such losses are made good by the owners of the vessel be it therefore agreed by these presents that whatever officer or seaman the master shall think proper to appoint shall take charge of her cargo in the lighters and go with it to the lawful quay, and there deliver his charge to the vessel's husband, or his representative, to see the same safely landed; that each seaman or mariner who shall well and truly perform the above-mentioned voyage, (provided always that there be no desertion, plun-
54 derage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores,) shall be entitled to the payment of the wages or hire that may become due to him pursuant to this agreement, as to their names is severally affixed and set forth; provided, nevertheless, that if any of the said crew disobey the orders of the said master or other officer of the said vessel, or absent himself without liberty, his wages due at the time of such disobedience or absence shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated or permitted to do further

duty it shall not do away such forfeiture, it being understood and agreed by the said parties that parol proof of the misconduct, absence, or desertion of any officer or any of the crew of said vessel may be given in evidence at any trial between the parties to this contract, any act, law, or usage to the contrary thereof notwithstanding; that for the performance of each and every of the above-mentioned articles and agreements, and acknowledgment of their being voluntary and without compulsion, or any other clandestine means being used, agreed to, and signed by us.

In testimony whereof, we have each and every of us hereunto affixed our hands the month and day against our names as hereunder written. And it is hereby understood and mutually agreed by and between the parties aforesaid that they will render themselves on board the said vessel on or before the day of , at o'clock in the noon.

We, who have subscribed our names in this column, do promise that the man who has engaged for this present voyage, and signed his name in the third column of the same line, shall proceed on the said voyage, agreeably to the shipping papers, or refund the advance-money with like amount, according to act of Congress, to on demand.

Names.	Place of residence.	Station.	Advance wages.	Whole amount of wages by the trip.	Wages due to Havana.	Wages due to Mobile.
John Murry	Mobile	Mate	$200	$1,000	$500	$300
T. S. Russel		1 eng'r	200	1,500	750	550
John F. Baneifer		Pilot	300	1,500	750	451
John Murphy		1½ eng'r	150	800	400	250
R. H. Snow		2 eng'r	100	400	200	100
Gor Strell		3 do	------	300	150	150
R. C. Smith		3rd ast.	------	300	150	150
John Weterhouse		Steward	50	200	50	100
John Nidswell		Carpenter	------	500	250	250
John Jefferson		Seaman	75	------	------	-----
Henry Jacobs		do	75	------	------	-----
Pat. Kane		do	75	------	------	-----
Peter Lawrance		do	75	------	------	-----
Charles Dannisbour		do	75	------	------	-----
William Benzer		do	75	------	75	75
Jos. Robertson		do	75	------	------	-----
Philip Denny		Fireman	75	------	------	-----
Charles Saxtroph		do	75	------	------	-----
E. Franchi		do	75	------	------	-----
Thom. Mark		do	75	------	------	-----
William Nugent		do	75	------	------	-----
Michael Welsh		do	75	------	------	-----
Peter McGlenn		do	75	------	------	-----
Jerome Retony		do	75	------	------	-----
Patrick Maloney		do	75	------	------	-----
James Shannon		Cook	75	*225	------	-----
John Dumas		Cabin-boy	------	†150	------	-----
Thimoty Finnegan		Fireman	75	------	------	-----

* In Havana $100 00; in Mobile $50 00.
† In Havana $25 00; in Mobile $25 00.

DISTRICT AND PORT OF MOBILE,
Collector's Office, 16 *June*, 1863.

I hereby certify that this is a true copy of the original shipping articles of the st'r Wm. Bagaley, conformably to the act of 20th July, 1840.

[SEAL.] J. C. COLSSON, *Dep'ty Coll'r.*

No. seven. July 23, 1863.

C. BUNKER.
M. HAHN, *Prize Com.*

Judgment.

THE UNITED STATES
vs.
THE STEAMER WM. BAGALEY, HER TACKLE, &C., AND CARGO. } In prize. 7,630.

This cause was this day tried before the court—district attorney for libellants—and after hearing the pleadings the libellants offered in evidence the admiralty warrant, monition, and marshal's return, the evidence taken before the prize commissioner, and the documents accompanying his report. And the court thereupon, in consideration of the law and the evidence, being satisfied that the allegations of the libel have been fully established, it is ordered, adjudged, and decreed that the steamer Wm. Bagaley, her tackle, &c., and cargo, now in the custody of the marshal, be, and the same are hereby, condemned as forfeited to the United States, and that after ten days' advertisement they be sold by said officer, and the proceeds thereof deposited in the registry for distribution according to law.

Rendered 17th August, 1863.
Signed 22nd August, 1863.

E. H. DURELL, *Judge.*

58 *Venditioni exponas, issued* 18 *Aug.*, 1863.

United States district court, eastern district of Louis'a.

The President of the United States of America to the marshal of the eastern district of La., or either of his deputies, greeting:

Whereas at a district court of the United States, holden at New Orleans, for and within said district, on the 17th day of August, A. D. 1863, the steamer Wm. Bagaley, her tackle, &c., and cargo, were, after proclamation and due proceedings, decreed forfeit and ordered to be sold at public auction: These are, therefore, to command you to sell to the highest bidder, at public aution, at the Planters' Press, corner of Richard and Annunciation sts., within said district, on Monday, thirty-first day of August, 1863, at 12 o'clock m., the said steamer Wm. Bagaley, tackle, and cargo, first giving ten days' notice, at least, of the time and place of sale, by advertising the same in the Era, one of the newspapers printed at New Orleans, and by proclamation in the usual form on the day of sale, the money arising from the sale to be paid into the registry of the said court, to be disposed of as the law in this case directs, and make due return hereof, with your doings herein.

Witness the Honorable E. H. Durell, judge, at New Orleans, this 18th day of August, A. D. 1863, and 88th year of the independence of the United States of America.

[SEAL.] K. LOEW, *D'y Clerk.*

Marshal's return, filed Sept. 4th, 1863.

In the United States district court, eastern district of Louisiana.

UNITED STATES
vs.
STEAMER WM. BAGALEY, HER TACKLE, APPAREL, and furniture, and her cargo. } No. 7,630.

By virtue of a writ of venditioni exponas, to me directed, in the above-en-

titled suit, I will proceed to sell to the highest bidder, on Monday, the 31st day of August, 1863, at 12 o'clock m., at the Planters' Press, corner of Richard and Annunciation streets, the steamer Wm. Bagaley, her tackle, apparel, and furniture, as she now lies opposite Post No. 27, first district, and also her cargo, consisting of 700 bales cotton, 3,300 staves, and 9 five-gallon demijohns of turpentine.

Terms: Cash at time of adjudication.

United States Marshal's Office, New Orleans, 19th day of August, 1863.

Aug. 20, 25, 28. JAMES GRAHAM, *U. S. Marshal.*

59 UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

Pursuant to this precept, I have caused the steamer Wm. Bagaley, her tackle and cargo, within named, to be sold by public auction and to the highest bidder, at the Planters' Press, on the day, hour, and place therein directed, having given ten days' previous notice of the time, place, and manner of the sale in the Era, one of the newspapers printed in New Orleans, and by the crier on the day of sale, and at such sale the purchasers were as under.

	Class.	Bales.	Weight.		Price.	Amounts.	
Fred. Del Bondio....	1	21½ bales cotton [B].	6,240	1–34	$0 58		
	2	43 ...do. .....[C].	10,829	1–42	56		
	3	50 ...do .....[O].	12,653	1–50	52½	$16,326 26	$16,547 63
E. Roger & Co...	4	40 ...do. .....[F].	} 61,600	1–30	49½		
	9	5+ bales cotton. F.		1–40	44½		
	10	59....do.....F..		51–100	45	28,105 05	28,396 98
B. W. Huntington....	5	50 ...do.....D..	23,696	1–50	48		
	14	30....do.....C..	14,816	81–110	54½		
	20	3... do.....P..	1,164	1–3	23½	19,782 66	
J. H. Heald.....	6	50....do.....D..	26,466	51–100	51½		
	8	33....do.....D..	19,954	151–189	47		
	17	30....do.....B..	14,053	51–80	58½		
	19	29....do.....B..	13,755	121–149	57		
	21	29....do.....A..	12,304	1–29	61	46,427 00	
Sam'l Bell.....	7	50....do.....D..	25,009	101–150	50		
	13	30....do.....C..	15,472	51–80	54	20,859 40	
S. H. Kennedy & Co.	11	48....do.....F..	21,091	101–148	44½	10,720 50	
D. O'D Sullivan....	12	50....do.....C..	23,084	1–50	54½	12,523 07	
Weisenbach & Klump	15	27....do..... C..	12,808	111–137	53	6,788 25	
Ed. Duprasseur & Co	16	50 ...do.....B..	22,750	1–50	58½	13,251 87	
Ralli, Benachi & Co.	18	40....do.....B..	19,483	81–120	57½	11,202 75	
		811 bales.....	.....	.....	.....	.....	185,986 81

60	Brought forward.....	$185, 986 81
	Sam'l F. Griffin, the st'r Bagaley, her tackle, &c.....	32, 000 00
400 bbls. coal, at 75 c.....		300 00
P. Marcus, 2,850 staves, p'r 100 at $3 50.....		99 75
E. Blessey, 8 demijohns turpentine, at $17 25.....		155 25
		218, 540 81

Whereby the gross sales amounted to two hundred and eighteen thousand five hundred and forty dollars and seventy-three cents, which I pay over to Alfred Shaw, clerk of the court aforesaid, to be disposed of as the court directs.

Attest: JAS. GRAHAM, *Marshal.*

Received from James Graham, United States marshal, two hundred and eighteen thousand five hundred and forty dollars and seventy-three cents, being (as he saith) the proceeds of the aforegoing sale; the moneys to be

disposed of as the court directs, and for which I have signed duplicate receipts.

ALFRED SHAW, *Clerk.*

New Orleans, Sept. 4th, 1863.

61 *Oath of appraisers, filed Aug. 24th, 1863.*

United States district court, eastern district of Louisiana.

UNITED STATES
vs.
STEAMER WM. BAGALEY, HER TACKLE, APPAREL, AND CARGO. } No. 7,630.

We, the undersigned, having been appointed by Michael Hahn, esq., prize commissioner, and James Graham, esq., United States marshal, appraisers, to value the steamer William Bagaley, her tackle, apparel, boats, anchors, furniture, and appurtenances, do severally and solemnly swear that we will faithfully and without partiality perform the duties of said office.

O. W. PITFIELD.
PETER STEEL.

Sworn to and subscribed before me this 24th August, 1863.

K. LOEW, *D'y Clerk.*

62 *Report of appraisers, filed August 25th, 1863.*

NEW ORLEANS, *Aug. 24th, 1863.*

The undersigned, duly appointed and qualified appraisers for the purpose of estimating and appraising the steamer Wm. Bagaley, her tackle, apparel, machinery, furniture, and appurtenances, (except cargo,) do now report that we have carefully and fully examined said objects, and that we find the value thereof to be, and do now appraise the same, as follows:

1. The steamer Wm. Bagaley, her tackle, apparel, and machinery, appraised forty thousand dollars.....	$40,000 00
2. Four hundred barrels of coal, appraised at a dollar a barrel.	400 00
Total appraisement forty thousand and four hundred dollars.	40,400 00

O. W. PITFIELD,
PETER STEEL, *Appraisers.*

Witness: MICHAEL HAHN, *Prize Commissioner.*

63 *Petition of Joshua Bragdon, filed August 31st, 1863.*

To the judge of the district court of the United States for the eastern district of Louisiana, in admiralty:

Joshua Bragdon, of the city of New Albany and State of Indiana, exhibits this his petition, and therein does allege and articulately propound as follows:

1. That he is now and has been for many years a citizen of the city and State aforesaid, and at the breaking out of the present rebellion against the government of the United States, and for a long time prior thereto, he was a member of the firm of Cox, Brainard & Co., at the city of Mobile, Alabama, who were at said date, and for some time prior thereto, the sole owners of the steamer Wm. Bagaley, her engines, tackle, furniture, and appendages, and that he has never in any way parted with or transferred his interest in the said co-partnership or the property belonging thereto, which interest and share amounts, as he verily believes, to one sixth of the whole value thereof.

2. From and after the time when the people of the States of Louisiana, Mississippi, and Alabama came under insurrectionary control, and were
64 declared to be in rebellion against the government of the United States, the said steamer was continually in the waters of the said States and under the control and management of those engaged in the rebellion aforesaid, whereby it became and was impracticable and unlawful for the petitioner either to proceed to said States or especially to the port of Mobile, Alabama, where said steamer generally was, or to exercise any act of ownership or control over the said firm property or the said steamer aforesaid, or the navigation thereof, and the said steamer so continued and remained in the waters of the States last aforesaid until on or about the twentieth of July, 1863, when she was captured by the naval power of the United States, together with her cargo, and brought to this district for condemnation, when and where, by a decree rendered by this hon. court, the same were condemned and the marshal ordered to sell the said steamer and cargo, and pay the proceeds arising from the sale thereof into the registry of this court, to be distributed according to law.

3. Your petitioner is further informed, and verily believes, that the cargo which was upon said steamer at the time of her capture was also the property of the said firm, of which he is and was a member, as aforesaid.

4. The petitioner represents that he is now and always has been a
65 true and loyal citizen of the United States, and has never in any way countenanced or given any aid, encouragement or assistance to the present rebellion and insurrection against the government of the United States, and that since the States of Alabama, Louisiana, and Mississippi were declared to be in rebellion against the government he has in no way exercised any acts of ownership or control over the said steamer, and that he had no connection with or knowledge of the unlawful conduct and voyage of said steamer, for and on account of which she was condemned as lawful prize.

5. In consequence of the petitioner's remaining true to his allegiance to the government of the United States, and giving no aid or encouragement to the present insurrection against the same, as he is informed, some court of the so-called Confederate States, holding its sessions at the city of Mobile, Alabama, undertook to and did, at some time during the year 1862, but at what precise date your petitioner is not informed, make and order a decree condemning and confiscating the interest of said petitioner in the said partnership, of which he was a member, and all the property belonging thereto.

But your petitioner avers that said decree is wholly nugatory and void, and that his interest in and to the said steamer and her cargo has never been extinguished or destroyed; and that inasmuch as he has never been
66 in any way engaged in any acts of hostility against the government of the United States, but has remained true to his allegiance thereto, and had no connection with or participation in the unlawful conduct or voyage of the said steamer, by reason of which she was condemned, he prays that out of the proceeds to be paid into the registry arising from the sale of said steamer and cargo he be paid the full amount of his interest therein, and for such other relief as may be proper and the court be competant to give in the premises.

JOSHUA BRAGDON,
By HENRY CRAWFORD, *Ag't and Att'y.*

GEO. L. BRIGHT,
Att'y and Counsel for Joshua Bragdon.

STATE OF LOUISIANA, *Parish of Orleans, ss:*

Henry Crawford, on his oath, says that he is the agent and attorney of the above-named petitioner, Joshua Bragdon, who is now absent from this State, at his place of residence in the State of Indiana; and further, that the matters propounded in the above petition are true, as he verily believes.

HENRY CRAWFORD.

Sworn to and subscribed before me this 31st August, 1863.

ALFRED SHAW, *Clerk.*

67 *Affidavit for commission, filed Sept. 1st, 1863.*

In the district court of the United States for the eastern district of Louisiana, in admiralty.

THE UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO, JOSHUA BRAGDON, intervenor. } No. .

Geo. L. Bright, attorney for Joshua Bragdon, intervenor, being sworn, says that Joshua Bragdon is now in the State of Indiana; that Horatio N. Devol, James Brooks, John H. Ashton, William B. Lent, and others, residents and citizens of New Albany, Indiana, are material and important witnesses for Joshua Bragdon, intervenor.

GEO. L. BRIGHT.

Sworn to and subscribed before me this 1st Sept., 1863.

K. LOEW, *D'y Clerk.*

Motion for a commission, filed Sept. 1st, 1863.

U. S. district court.

THE UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO, JOSHUA BRAGDON, intervenor. } No. .

On motion of Geo. L. Bright, attorney for Joshua Bragdon, intervenor, it is ordered that a commission issue to take the testimony of Horatio N. Devol, James Brooks, John H. Ashton, William B. Lent, and others, residents and citizens of New Albany, Indiana, directed to Robert M. Weir, esq.,
68 United States commissioner, to take, certify, and forward the depositions of said witnesses, and that days be allowed for the return thereof. It is further ordered that a copy of the interrogatories to be propounded to the witnesses be served upon the district attorney, and that he be allowed three days to file his cross-interrogatories. It is further ordered that all parties interested be notified by posting the interrogatories in the clerk's office of this court during three days.

Record of submission, from minutes of Sept. 1st, 1863.

THE UNITED STATES
vers.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630.

Geo. L. Bright, esq., attorney for Joshua Bragdon, intervenor herein, this day moved the court to grant a commission for the purpose of examining certain witnesses residing in the State of Indiana, named in the affidavit on file, which motion being argued by the district attorney and the counsel for intervenor, the court took the matter under advisement.

69 *Reclamation of Ralli, Benachi & Co., filed Sept. 14th, 1863.*

In the district court for the e'n dist. of La.

THE UNITED STATES
vers.
THE ST'R WM. BAGALEY.

And now into this honorable court comes Ralli, Renachi & Company, merchants, Greek subjects, residing and doing business in New Orleans, who make known to this honorable court that they purchased at marshal's sale, under venditioni exponas in this case, forty bales cotton, of the cargo of the William Bagaley, condemned as prize; your petitioners being the last and highest bidders for said forty bales cotton, at the price of 57½ cents per pound; that said cotton was sold per sample, made by a broker employed by the U. S. marshal, and was weighed by the weigher of the said marshal; and that the quality and weight of the said cotton were guaranteed by the marshal to be as stated by his said broker and weigher; that your petitioners paid for said cotton as weighing 19,483 pounds, whereas, in fact, the cotton only weighed 19,438 pounds, making a difference of forty-five pounds in the weight, which, at 56¼ c. a pound, amounts to twenty-five dollars and thirty-one cents.

Your petitioners and claimants further show that having found after the sale, by sample redrawn, that the quality of the said forty bales of cotton was inferior to the samples by which it had been sold, two competent
70 and experienced cotton brokers were chosen, (according to mercantile usage in New Orleans,) one by your petitioners and one by the broker (Mr. Heald) of the marshal, to act as arbitrators in relation to the quality of the cotton, and that the said arbitrators gave it as their unanimous opinion and accord that the redrawn samples were not equal to the original samples, and that your petitioners were entitled to a diminution of one cent a pound on the price of the said forty bales of cotton, by reason of said discrepancy in quality.

Your petitioners and claimants show that said diminution of one cent a pound on 19,483 lbs. amounts to $194 83, making (together with the deficiency in weight above mentioned) a total of two hundred and twenty dollars and fourteen cents overpaid by your petitioners to the marshal, and which they are entitled to reclaim and do reclaim from the proceeds of the said cotton, now in this honorable court.

And your petitioners further show that they have made amicable demand of settlement from J. Graham, esq., United States marshal, but that he has required them to obtain an order of this honorable court for the correction or the errors aforesaid.

Wherefore your petitioners pray for a decree correcting the return of marshal's sales of cotton in this case, and adjudging to petitioners the aforesaid sum of two hundred and twenty dollars and fourteen cents, with costs of this intervention and claim, out of the proceeds of the said sale, with all other and further relief, &c.

M. M. BENACHI.

BUCHANAN, *Att'y of Pet'n'rs.*

71 Sworn to and subscribed before me this 14th day of September, 1863.

K. LOEW, *D'y Clerk.*

Certificate annexed to reclamation, filed Sept. 14th, 1863.

SEPTEMBER 2*nd*, 1863.

Weights of 40 bales cotton to Ralli, Benachi & Co.:

B & B, 51 to 90. 51—B, 81, 311; 82, 573; 83, 536; 84, 484; 85, 486; 86, 498; 87, 493; 88, 456; 89, 476; 90, 516. 61—91, 519; 92, 582; 93, 518; 94,

523; 95, 559; 96, 512; 97, 292; 98, 481; 99, 549; 100, 453. 71—101, 487; 102, 487; 103, 225; 104, 481; 105, 454; 106, 429; 107, 530; 108, 454; 109, 523; 110, 499. 81—111, 485; 112, 522; 113, 375; 114, 597; 115, 488; 116, 521; 117, 544; 118, 507; 119, 501 90—120, 512 = 19438 lbs.

I, the undersigned, do hereby certify the above-mentioned weights to be correct.

A. HOFFMAN, *Wr.*

72 Annexed to reclamation:

SEPTEMBER 5th, 1863.

D'R SIR: In the matter of reclamation on the lot of 40 b. c., B 18, the purchaser selected Mr. Tomlison and I select Mr. Rainey, both well known brokers, and they were to take Mr. A. F. Jones as umpire in case they did not agree. Their report was at ordinary prices, say 8 to 10c. per lb., the difference would be, in their estimation, $\frac{1}{4}$ c.; that now cotton being 5 times in value or 6 times, the difference should be in proportion, and fixed it at one cent.

Had I been the purchaser I should not have thought of making any claim. This is according to commercial usage, to fix any differences between buyers and sellers, where there is alleged discrepancy between samples as sold by and samples redrawn.

Respectfully,

J. H. HEALD.

JAMES GRAHAM, Esq., *U. S. Marshal.*

NEW ORLEANS, *5th Sept.*, 1863.

73 Annexed to reclamation:

We, the undersigned, cotton brokers, having examined the samples and redrawn samples of the following lot of cotton sold by the U. S. marshal on 31st Aug. last, at the Planters' Press, to Messrs. Ralli, Benachi & Co, viz: Mark B, lot 18, Nos. 81–120, 40 bales cotton, we do hereby certify that the redrawn samples are not equal to the original samples, and we have adjudicated said difference at 1 c. (one cent) per pound in favor of Messrs. Ralli, Benachi & Co, on the above 40 bales cotton.

ARCHIE M. TOMLISON.
JAMES RAINEY.

New Orleans, 2nd September, 1863.

STATE OF LOUISIANA, *City of New Orleans:*

I, Alphonse Barnett, a notary public in and for the city and parish of New Orleans, State of Louisiana aforesaid, duly commissioned and sworn, do hereby certify that this day before me personally came and appeared James Rainey and Archie M. Tomlison, who, having been duly sworn to declare the truth, deposed that the statement made by them on the reverse hereof is just and true.

In faith whereof, I grant these presents under my signature and the impress of my seal of office, at New Orleans, this 5th day of Sept., 1863.

[SEAL.] A. BARNETT, *Not. Pub.*

74 The court being satisfied of the correctness of the within reclamation, it is ordered that the clerk and registrar of this court be authorized to pay the same, amounting to two hundred and twenty 14-100 dollars, out of the fund on deposit herein.

E. H. DURELL, *Judge.*

New Orleans, Sept. 15th, 1863.

Marshal's bill, filed Sept. 22nd, 1863.

U. S. MARSHAL'S OFFICE,
New Orleans, 18th Sept., 1863.

District court of the United States, eastern district of Louisiana.

UNITED STATES
versus
STEAMER WM. BAGALEY, HER TACKLE, APPAREL, FURNITURE and cargo. } No. 7,630.

Certified statement of marshal's fees and charges reasonably accrued.

75

1863.		
July 24. Executing warrant from Prize Com'r Hahn		$2 00
26. Executing ad. warrant and libel		4 00
Aug. 19. Executing venditioni exponas		2 00
Summoning appraisers		1 00
31. 3 proclamations at sale		90
Attendance before com'r for self and deputy		4 00
Transportation to and from vessel		6 00
Labor weighing anchor and mooring		12 00
Stevedore's bill, unloading cargo, (C. Wheeler)		210 85
Advertising monition and sale, (Era and Picayune)		24 00
Storage, cargo in Planters' Press, (Wm. M. Abbatt)		167 30
Classifying cotton, J. H. Heald's bill		566 06
Weighing cotton, J. H. Hanna's bill		81 10
Drayage, cargo, Jas. Murphy bill		110 25
1 per cent. commissions superintending sale	$250 00	
1¼ per cent. commission acting as auctioneer	2,731 75	
		2,981 75
Keeping vessel 40 days, 2 keepers		200 00
		4,373 21

I certify the above to be the costs and charges of the U. S. marshal in the above-entitled cause pursuant to law.

J. Q. A. HOIT, *Dep. U. S. Marshal.*

76 *Order allowing marshal's bill, from minutes of Sept. 22nd, 1863.*

UNITED STATES
vers.
ST'R WM. BAGALEY, &C, AND CARGO. } No. 7,630.

On motion of the district att'y, it is ordered that the costs of the U. S. marshal in this case, amounting to $4,373 21, be allowed.

Quartermaster's bill, filed Oct. 3rd, 1863.

The United States to quartermaster department, dep't of the Gulf, Dr.

1863.

Sept. 7. For general hospital tax on cargo of cotton brought to this city by prize steamer Wm. Bagaley, levied by Special Order No. 82 from headq'r dep't of the Gulf, viz:

655 bales cotton, $5 00 per bale	$3,275 00
156 half bales cotton, $2 50 per half bale	390 00
	3,665 00

HEADQUARTERS DEP'T OF THE GULF,
Nineteenth Army Corps, New Orleans, March 25, 1862.

Special Orders No. 80.—Extract.

14. A tax of five dollars per bale will be collected by the quartermaster's department on all cotton sold in the department of the Gulf, the proceeds to be devoted to general hospital purposes.

By command of Maj. Gen. Banks:

RICHARD B. IRWIN, *A. A. General.*

77 HEADQUARTERS DEPARTMENT OF THE GULF,
19th Army Corps, New Orleans, March 27, 1863.

Special Orders No. 80.—Extract.

11. Paragraph 14 of Special Orders No. 80, current series, is amended so as to require that the hospital tax of five dollars per bale on cotton shall be collected on all cotton brought to New Orleans.

By command of Major General Banks:

RICHARD B. IRWIN, *A. A. General.*

Harbor master's bill, filed Oct. 3rd, 1863.

NEW ORLEANS, *Oct. 3rd*, 1863.

Steamer Wm. Bagaley to board of harbor masters and master and wardens, Dr.

To harbor master's dues on 396 tons, at 2 c'ts per ton.....	$7 92
Port warden's entrance fee.....	5 00
Surveys.....	
	12 92

Received payment.

78 *Claim of board of health, filed October 13th, 1863.*

No. 240. QUARANTINE STATION, *July 22nd*, 1863.

Pay to the secretary of board of health ten dollars, quarantine fees of prize steamer Wm. Bagaley.

C. C. BUNKER, *Acting Mister, Master.*

To Master on board.

Order appointing L. M. Day attorney for captors, from minutes of Oct. 27th, 1863.

UNITED STATES
vers.
ST'R WM. BAGALEY, TACKLE, &C., AND CARGO. } No. 7,630.

It is ordered by the court that L. Madison Day, esq., be appointed attorney to represent the captors interested in this case, and that he be duly notified hereof.

United States district court, eastern district of Louisiana.

79 UNITED STATES
vers.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630.

To L. Madison Day, Esq.:

Please to take notice that the court has this day appointed you attorney to represent the captors interested in the above-entitled case.

Clerk's office, Oct. 27th, 1863.

[SEAL.] K. LOEW, *D'y Clerk.*

Marshal's return.

Received Oct. 27th, 1863. Served on the same day on L. M. Day, esq, in person. Left in his office.

D. CHRISTIE, *Dep'y U. S. Marshal.*

Affidavit of claim, filed November 3rd, 1863.

District court of the United states for the eastern district of La.

In the matter of the steamer Wm. Bagaley and her cargo, a prize.

Wm. P. Dockray, acting master of the U. S. navy, detached from the U. S. st'r De Soto, of which W. M. Walker is commander, being duly
80 sworn, deposes any says that the annexed statement is correct and true. And deponent further says that if at any time hereafter, and before the final condemnation or acquittal of said captured property, any further or other papers relating thereto shall be found or discovered to his knowledge, they shall be delivered up or information thereof given to the prize commissioners of this district or to the honorable court.

W. S. DOCKRAY, *Act. Master, U. S. N.*

Sworn to and signed before me, Alfred Shaw, special prize commissioner, this the 20th day of October, 1863.

New Orleans, La.

ALFRED SHAW,
Special Prize Commissioner.

I, Wm. P. Dockray, acting master in the United States service, attached to the U. S. st'r De Soto, do state, under oath, the following facts, viz: That the U. S. steam sloop-of-war Ossipee, Capt. Gillis, U. S. N., commenced chase after a steamer, (which proved to be the Wm. Bagaley,) at about ten 25 a. m., July 18th, 1863. At about 1½ p. m., same day, U. S. st'mship De Soto, Capt. Wm. Walker, commenced the chase, after having captured the st'r James Battle; that the De Soto steered about SE. ½ S. from 1½ p. m until 11½ p. m., previous to which she came up with and passed gunboat Kennebec in pursuit. Afterwards came up with U. S. steam sloop Ossipee,
81 and when about opposite or abreast of said war vessel, and in sight of the Bagaley, the said Ossipee, finding the De Soto passing her, and would make the capture, fired a gun, when the Bagaley hove to. The De Soto kept on, passed the Ossipee, lowered a boat, boarded the Bagaley, and took from her her captured papers and put a prize crew on board. Meantime the Ossipee had come up, and Capt. Gillis, being senior officer to Capt. Walker, of the De Soto, ordered the latter to send the captain of the Bagaley and his papers on board the Ossipee, which Capt. Walker did under protest. Capt. Gillis also ordered the De Soto's prize crew off the Bagaley, and put a prize crew on the Bagaley with a prize master from the gunboat Kennebec, and ordered her to New Orleans. The officers and crew of the De Soto claim to be the captors of the st'r Wm. Bagaley and cargo, and that Capt. Gillis used his authority, as senior officer to the commander of the De Soto, by rank.

Dated at New Orleans, October 20th, 1863.

W. P. DOCKRAY, *Act. Master, U. S. N.*

Appraiser's bill, filed Nov. 10th, 1863.

NEW ORLEANS, *Aug. 24th*, 1863.

Steamer Wm. Bagaley to P. Steele, Dr.

To services rendered in appraising said boat..... $20 00

82 *From minutes of Nov. 16th, 1863.*

UNITED STATES
vs.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630.

On motion of the district att'y, ordered that the hearing of this cause be assigned for Wednesday, 18th inst., at 10 a. m., and that the parties interested be duly notified thereof.

Notice of trial.

United States district court, eastern district of Louisiana.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

To Geo. L. Bright and L M. Days, E'q'res:

You are hereby notified that the above cause has been assigned for trial on Wednesday, 18th inst., at 10 a. m.

By order of court.

N. O., Nove'r 16th, 1863. K. LOEW, *D'y Clerk.*

Marshal's return.

Received 16th Nov'r, 1863. Served a copy of the within notice of trial on Geo. L. Bright in person Nov. 17th, 1863. Served a copy of the within notice of trial on L. M. Day in person Nov. 16th, 1863.

J. S. BADGER, *D'y U. S. Marshal.*

83 *Documents from vessels claiming share in the capture, filed November 18th, 1863.*

U. S. FLAG-SHIP SAN JACINTO,
Key West, Florida, July 28th, 1863.

To the hon. the judge of the U. S. district court for the eastern district of Louisiana:

Acting Rear Admiral Theodorus Bailey, commanding the eastern Gulf blockading squadron, on his own behalf and also on behalf of the U. S. steamer De Soto, makes claim to share in the prize steamer William Bagaley, on the ground that the said Bagaley was captured on the night of the 18th of July, 1863, within the limits of the eastern Gulf blockading squadron, by the De Soto, one of the vessels of that squadron, the U. S. steamers Ossipee and Kennebec being within sight at the time, and entitled to share in the prize.

Enclosed is a copy of the report of Captain William M. Walker, commanding the De Soto, detailing the circumstances of the capture.

THEODORUS BAILEY, *Acting Rear Admiral,*
Commanding Eastern Gulf Blockading Squadron.

84 U. S. SHIP DE SOTO, *Gulf of Mexico, July* 20, '63.

SIR: The morning of Saturday, the 18th, found us lying to in lat. 29° 21′, lon. 87° 8′, the position I had selected at night. At 5.15 discovered a smoke bearing nearly west; stood for it. At 6.15 made another smoke on the beam, bearing N. by E.; and at 6.30 a sail abaft the beam. Pressed on our course, when at length it was believed that the steamer ahead was an armed vessel, mounting heavy guns, cleared for action. We now gained very slowly upon her. At 7.15 showed our colors, to which she did not reply; after which threw a shot in her direction, to which she paid no attention, but changed her course, increased her speed, and commenced throwing cotton overboard. We then fired several shots, which fell near her. We began to be ap-

prehensive that she might escape us. At 8.30 she stopped. Sent alongside, took possession, and put a prize crew on board. She proved to be the James Battle, of and from Mobile, for Havana, laden with cotton. After we were in possession it was observed that the sail we had first seen at 6.30 was distant not less than 15 miles, her lower yards just appearing. She was far beyond signal distance. At 10 the strange sail came up, proving to be the U. S. S. Ossipee, Capt. Gillis. I was
85 necessarily very busy, and said so as she passed, my presence absolutely required on board the De Soto, but Capt. Gillis sent a boat on board requiring me to go on board of him. He had nothing of importance to communicate, but inquired particularly about the cargo of the steamer. He then said that Judge Marvin had gone home, there was no court at Key West, and suggested I should send my prize to New Orleans; that they were very inattentive at Key West, &c. I replied, on the contrary, that we had found the court at Key West very prompt in attention to the business brought before it, and that my orders required me to send all prizes to Key West. I begged not to be detained, and arose to go, inquiring at the same time of Capt. Gillis where he was next bound. To this he replied, "back to Mobile." I then returned to the De Soto, and the Ossipee steamed away on a course about E to E. ½ S., and in time disappeared from view. One of the engines of the prize was out of order, probably had been put out of order, and I had to disconnect it, which delayed me some time.

My resolution had early been taken to start after the other steamer, with the determination if I did not fall in with her to await her off Havana. Therefore as soon as the James Battle was under way for Key West I started on a course SE. by E.; not a ship, not a smoke in sight. At 2.15 from the masthead make a smoke. At 3 40 made the Ossipee and a smoke to
86 the s'd of her. We kept on our course, hauling a little southerly. At 3.30 made another smoke going to the s'd. At dark the Ossipee was distant about 6 to 7 miles, the smoke we were in chase of apparently about 12 miles. At about 10.15 came up with and passed on our port beam what appeared to be one of our gunboats. As she passed she showed her night signal, to which we replied. We then heard from her some indistinct hailing, to which we paid no attention. She next hung a lantern over the stern, for what purpose we could not surmise, unless to direct the Ossipee, for it was supposed by us that this small steamer was in advance of the Ossipee. In about half an hour discried the hull of a vessel on our starboard beam. We kept off to the s'd to ascertain if she were the steamer we were in chase of, but on nearing discovered her to be the Ossipee; hauled back on our course, and soon after, below the cloud of smoke we were following, we saw the strange steamer. After we had got well in advance of the Ossipee and were making preparations to hail and board the strange vessel the Ossipee fired a blank cartridge, apparently from a small gun, whereupon we showed to her, abaft the wheel-house, our night signal. As we closed with the stranger she stopped. We then boarded and took possession of the st'r Wm. Bagaley, Charles Frisk, master, from Mobile for Havana, with 750 bales of cotton, and the master and his papers were
87 brought on board. While this was transpiring the Ossipee came up and sent an officer on board the Bagaley to take possession, who was notified that the steamer was in possession of the De Soto; whereupon the officer of the Ossipee sent his boat back to her, it is presumed, with that information.

Meanwhile the organization of the prize was going on. The exec. off., engineer, and other officers, 24 seamen, a corp'l and marines were engaged in this duty, when an officer came on board from Capt. Gilliss, directing me to send the master of the captured steamer, with his papers, on board to him, who claimed her as his prize. This order was repeated soon after through

another officer. I thereupon directed Lt. Com. Bradford to give the Bagaley in charge of the officer from the Ossipee, and so soon as I could give the matter attention, I sealed up the papers of the prize, together with the affidavit of the officer by whom they had been received, and sent them, accompanied by her master, on board to Capt. Gilliss, to whom at the same time I addressed, at midnight, the hastily written letter, whereof I enclose a copy.

I cannot conclude this paper without expressing my surprise at the act of Capt. Gilliss, which dispossessed me of a prize, within the limits of your command. I would be glad to learn that his course, which appears so high-handed, may be justified by considerations of public safety or neces-
88 sity, which were not revealed to me. No officer has a higher respect than I have for the prerogative of rank, nor would I have its functions abridged; but it should be excercised with consideration and discretion under heavy responsibility. In the instance to which I now call attention Capt. Gilliss appears to have exercised it without due consideration for myself, his equal in rank, and with an utter disregard of that comity which should have led him to refrain from all unnecessary interferance with the ships under the special orders of the admiral com'd'g the E. G. B. squadron.

I am, sir, very respectfully, your obedient servant,

(Signed) WM. M. WALKER, *Capt. U. S. N*

To Act'g Rear Admiral THEODORUS BAILEY, *Com'd'g E. G. B. Squadron.*

89 U. S. S. DE SOTO,

Gulf of Mexico, Midnight, July 19th, 1863.

SIR: Enclosed I send on board to you by your order, conveyed to me by Charles Adams, act'g ensign on board the U. S. S. Ossipee, and also by O. L. S. Roberts, acting ensign on board this ship, the papers of the steamer Wm. Bagaley, of Mobile, from Mobile bound to Havana, seized and taken possession of by this ship for violation of the blockade proclaimed and instituted by the President of the United States. The steamer William Bagaley is said to be laden with 760 bales of cotton.

I send on board by the same conveyance, and by your order, Charles Frisk, master of the Wm. Bagaley. At the time of taking possession of the Wm. Bagaley the U. S. steamers Ossipee and Kennebec were in sight.

I am, sir, very respect'ly, your ob't servant,

(Signed) WM. M. WALKER, *Capt. U. S. N.*

Capt. JOHN P. GILLISS, *U. S. N., Com'd'g U. S. S. Ossipee.*

90 U. S. SHIP DE SOTO,

At Sea, Sept. 5th, 1863.—*Lat.* 25° 18′ *N.; lon.* 83° 55′ *W.*

SIR: On the night of the 18th July this ship seized and took possession of, for violation of the blockade proclaimed and instituted by the President of the United States, the steamer Wm. Bagaley, from Mobile, laden with cotton, and bound to Havana.

At the time of this capture the U. S. steamers Ossipee and Kennebec were within signal distance. After the capture of the Wm. Bagaley by this ship she was surrendered to the custody of Capt. Gillis, of the Ossipee. What disposal was afterwards made of the Wm. Bagaley I am not informed; but as I have some reason to believe, she was sent to New Orleans for adjudication, I think it proper to make the above declaration in order that in the distribution of the proceeds of the sale of the Wm. Bagaley and cargo the rights and interests of the officers and crew of this ship may not be overlooked.

I am, sir, very respect'ly your ob't serv't,

W. M. WALKER, *Capt. U. S. N.*

To the JUDGE OF THE U. S. DISTRICT COURT,
for the Eastern District of Louisiana.

91 U. S. STEAMER KANAWHA,
Blockade of Mobile, July 25th, 1863.

SIR: I have the honor to address you on the claim of this ship to share as joint captor of the steamer Wm. Bagaley, seized as prize for violating the blockade of this port, and sent to New Orleans by the U. S. S. Ossipee, for adjudication. I enclose a tracing of the approaches to Mobile Bar, and last position x, y, z, of the blockading squadron off this port. The station of this vessel was A on the night of July 17 p. m. and 18th a. m., civil time. The Wm. Bagaley escaped through the swash channel. Early in the evening of July 17 signal lights were made by the rebels on the Fort Gaines side, signalized to Fort Morgan, which we interpreted at the time as lights of warning that the western channels were blockaded. This interpretation is gathered from our experiance with lights of that description and from the official character and meaning of them as issued to all blockade-runners by Col. Powell, commanding at Fort Morgan.

At forty minutes past midnight, July 18, civil time, by the time-keeper of this ship, the firing of guns and burning of signals, issuing of rockets by vessels guarding the swash channel, advised the fleet of vessels running out from the bay of Mobile; and on the 20th inst. two of the fleet, which had given chase, viz: Ossipee and Kennebec, returned to their posts
92 having as prize the William Bagaley, which vessel was one of the two that escaped out of the swash channel aforesaid at the time the aforementioned signals of alarm were made to the fleet.

We claim that our presence, closely shutting the western channels, which had been unguarded and freely used for exit, turned the Wm. Bagaley through the swash channel as being next best for her purposes.

I take the liberty of forwarding to you the accompanying extracts in support of our claim, and feel assured that the hon. judge will decree that captures made by one vessel of a blockading fleet, whilst associated with that fleet on common duty, share to the benefit of the whole fleet.

Very respectfully, your ob't serv't,

W. K. MAYO, *Lt. Com'd'r.*

Hon. E. H. DURELL, *Judge U. S. Dist. Court, New Orleans.*

Brief.

In respect to captures made by ships which are associated in the same service, or engaged in joint enterprize under the orders of the same superior officer, it is a general rule that they are entitled to share in each other's prizes made while in such service or joint enterprize. (*h*) Therefore, if one ship of a squadron takes a prize in the night, unknown to the rest, it will entitle the whole fleet to share, although, possibly, the capture may
93 have been made at a distance out of sight of most of the ships-of-war, even if it had been noonday, for the fleet so associated is considered as one body, unless detached by orders, or entirely separated by accident, and what is done by one, continuing to compose in fact a part of the fleet, enures to the benefit of all. (*i*) Where a fleet is employed in a blockade the service is considered as joint, and all ships are entitled to share in all captures, although all the ships have not joined in the chase, and the capture has been made after the chase, at a great distance from the blockaded port. (*k*)

(*h*) The Foresigheid, ib. p. 311; the Guillaume Tell, Edw., p. 6; the Empress, 1 Dodson, p. 368.
(*i*) The Forsigheid, 3 Rob., p. 6; S. C. Edw., p. 124.
(*k*) The Guillaume Tell, Edw., p. 6; the Forsigheid,

All public ships-of-war being in sight are deemed to be constructively assisting, and therefore entitled to share in the capture—(3 Phill. Int., L., sect 389, and in note z.) and this though capture made in the night, and actual view prevented by darkness. All that is necessary is, the vessed should be near enough to be seen if it were daylight. (3 Phill. Int. L., sect. 394.)

94 Rear Admiral Bailey, it seems, is not entitled to share, as he was absent at the time of capture. (3 Phill. Int. L., sect. 398; the Forsigheid, 3 Rob. 6.)

(Extract from Commentaries on Int. Law, by Phillimore, p. 360 and 398.)

Brief.

[Extract from Halleck's International and Military Law, p. 732, sec. 11.]

In respect to captures made by ships which are associated in the same service or joint enterprize, under the same superior officer, as a general rule, all are entitled to share as joint captors, although not in sight at the time of capture. The fleet so associated is considered as one body, acting together for one single object, and what is done by a part enures to the benefit of all. The only question to be considered is, whether the capturing ship at the time the capture was made composed de facto a part of the particular fleet. Thus where a capture was made by ships composing part of a squadron employed in the blockade of the Texel, out of sight of the fleet, and without any concurrence in chasing, the court held that the blockading fleet were all joint captors. So where a prize coming out or entering a blockaded port is taken by one of the ships of a blockading squadron

95 stationed off the mouth of the harbor, while the rest of the squadron, maintaining the blockade, are stationed at some distance. In the case of the Guillaume Tell, a squadron was stationed to watch the harbor of La Valletti. The prize, in attempting to escape, was pursued and taken by a part of the squadron, while the others remained stationary. The claim to joint capture was allowed, notwithstanding the physical impossibility of active co-operation arising from the state of the wind. (Phillimore on Int. Law, vol. 3, § 398; Wildman, Int. Law, vol. 2, pp. 330, 332; the Forsigheid, 3 Rob. Rep., p. 311, Edw. Rep., p. 124; the Harmonia, 3 Rob. Rep., p. 318; the Henrietta, 2 Dod. Rep., p. 96; the Guillaume Tell, Edw. Rep., p. 6; the Empress, 1 Dod. Rep., p. 368.)

U. S. Gunboat Aroostook, *off Mobile, July 22nd*, 1863.

Sir: I beg leave to transmit herewith a certified copy of the log of this vessel on the day of the chase of the captured rebel steamer William Bagaley, of which this vessel claims to be a joint captor; and also to submit for your consideration the following statements, to wit:

On the morning of the 18th July, shortly after midnight, I apprized the squadron, by signal, of the presence of two strange sails, and from the

96 fact that they were both making black smoke I concluded that they were enemies. I slipped the cable after discovering the first one, and stood after her, and signalled the course I was steering, and fired eighteen shots at her. The darkness of the night making the distance very uncertain. I was unable to bring her to. I continued in chase, however, and she was afterwards taken by the De Soto, and proved to be the James Battle. At daylight Ossipee and Kennebeck in pursuit of vessels that had run out; Ossipee passing ahead of me; a little after daylight the Kennebec made signal to the Ossipee, "strange sail in sight" and started in pursuit; she (the strange sail) was overtaken and captured by the Ossipee at about 11 o'clock of the same night; she proved to be the William Bagaley. I claim to be a

joint captor of this vessel, upon the ground that I apprized the squadron at anchor off Mobile of the presence of these vessels, and was one of three vessels that started in pursuit, and although I was not in sight at the capture of the Wm. Bagaley, yet I consider that this vessel was one of a joint enterprize by which she was captured. I think there are cases on record in which judgment has been awarded to vessels as joint captors on less grounds than those presented above.

I have the honor to be, very respectfully,

S. R. FRANKLIN,
Lieut. Commander U. S. Gunboat Aroostook.

Hon JUDGE OF THE UNITED STATES DISTRICT COURT, *New Orleans, La.*

97 *Log of the United States gunboat Aroostook, commanded by Lieut. Commanding S. R. Franklin.*

H.	Knots.	Fathoms.	Wind. Courses.	Direction.	Force.	Remarks.
A. M.						
1	----	----	----------	----------	------	*On this 18th day of July, 1863, commences and till* 4 *a. m.*—At 0.15 made a steamer bearing SE.; beat to quarters, slipped cable and began firing from XI inch and rifle guns at strange sail, and made private Coston signal No. 4. and rocket. A 0.30 made another steamer bearing E.NE ; made private Coston signal No. 6, and general signal 369. Standing in chase of strange sail to S.SE.
2	----	----	----------	----------	------	
3	----	----	----------	----------	------	
4	----	----	----------	----------	------	
5	----	----	----------	----------	------	
6	----	7	S. by E. ¾ E..	S. by E. ¾ E.	------	
7	----	7	----------	S.SE.	------	
8	----	7	----------	----------	------	
9	----	----	----------	----------	------	
10	----	----	----------	----------	------	
11	----	5	----------	----------	------	
12	----	5	----------	----------	------	
P. M.						Temperature.—Weather, ; air, ; water, ; barometer, .
1	5	----	----------	S.SE.	------	Distance per log, ; latitude, D. R, ; longitude, D. R, ; latitude observed, ; longitude, ; current, ; variation, .
2	5	----	----------	----------	------	
3	5	----	----------	N.NW.	------	WM. A. MAINE.
4	4	----	----------	..do..	------	
5	6	----	----------	..do..	------	*From* 4 *to* 8 *a. m.*—At 4 in chase of steamer to s'd. At 4.15 U. S. S. Ossipee hailed and we reported the chase in sight, directly ahead. At 5.45 Kennebec made signal 1,116, 387. The Ossipee answers and made a signal to the Kennebec, which was not answered. At 6.35 the Kennebec fired a gun at another steamer she was chasing. At 6.40 made out large side-wheel steamer standing in for the chase. At 6.50 the strange steamer commenced firing at the chase, and continued firing at intervals.
6	6	----	----------	..do..	------	
7	6	----	----------	..do..	------	
8	6	----	----------	..do..	------	
9	6	----	----------	..do..	------	
10	2	----	----------	S.SE.	------	
11	1	----	----------	----------	------	
12	1	----	----------	----------	------	
						T. S. SPENCER, *Lieut. U. S. N.*

98 *From* 8 *a. m. to meridian.*—At 8.45 strange sail fires at chase, and black smoke disappears. Supposed she was captured at that time. At 9 inspected crew at quarters. Remainder of watch employed in picking up cotton thrown overboard by chase previous to her capture. Wind N. Weather, b. c.

EDWARD CALLENT.

From meridian to 4 *p. m.*—At 2 bore up for Mobile, steering N. NW. At 2 were 75 miles S.SE from Mobile, wind, S. 4; weather, b. c.

EBEN HOYT.

From 4 *to* 6 *p. m.*—Wind NW.; weather, b. c. At 5.30 inspected crew at quarters.

WM. A. MAINE.

From 6 *to* 8 *p. m.*—Wind N.NW. 2; weather, b. c. At 8 got cast of lead, bottom at 21 fathoms; fine grey sand.

EBEN HOYT.

From 8. *p. m. to midnight.*—Wind 0; weather, b. c. Sounded in 17 fathoms water.

WM. A. MAINE.

Intervention of Lieut. S. R. Franklin, filed November 18*th*, 1864.

District court of the United States, eastern district of Louisiana, in prize.

THE UNITED STATES
vs.
THE STEAMER WILLIAM BAGALEY. } No. 7,630.

To the Honorable E. H. Durell, judge of the district court of the
99 United States for the eastern district of Louisiana:

The petition of intervention of Lieut. S. R. Franklin, commanding the United States vessel-of-war the gunboat Aroostook, and of the officers and men attached to said vessel at the time of capture herein, respectfully represent that they were joint naval captors of the vessel and cargo, the subject of this suit, being at the time of the capture a part of the blockading squadron off Mobile, and actually engaged in blockading the port of Mobile, and as such have an equal interest with the libellants in the adjudication herein. They aver that the facts set forth and contained in the libel of information are true and correct, and they join in the prayer hereof for the decree of this court for the condemnation of said captured property as lawful prize of war. And these intervention do further pray that after said decree shall have been duly rendered herein, and said property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this honorable court will proceed to render a final decree and distribution.

L. MADISON DAY, *Captors' Proctors by app't of the Court,*

100 *Intervention of Theodorus Bailey, filed November* 18*th*, 1864.

District court of the United States, eastern district of Louisiana.

THE UNITED STATES
vs.
THE STEAMER WILLIAM BAGALEY. } No. 7,630.

To the Honorable E. H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The petition of intervention of Theodorus Bailey, acting rear admiral, and commanding eastern Gulf blockading squadron off Mobile, and command-

ing the United States vessel-of-war and flag-ship San Jacinto, and of the officers and men attached to said vessel at the time of capture herein, respectfully represents that they were joint naval captors of the vessel and cargo, the subject of this suit, being at the time a part of the blockading squadron off Mobile. Acting rear admiral and commanding the eastern Gulf blockading squadron off Mobile, (though absent at the time on duty,) and as such have an equal interest with the libellants and intervenors in the adjudication herein. They aver that the facts set forth and contained in the libel of information are true and correct, and they join in the prayer hereof for the decree of this court of the condemnation of said captured property
101 as lawful prize of war. And these intervention do further pray that after said decree shall have been duly rendered herein, and said property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this honorable court will proceed to render a final decree and distribution.

L. MADISON DAY, *Captors' Proctor by app't of the Court.*

Intervention of William M. Walker, filed November 18th, 1863.

District court of the United States for the eastern district of Louisiana, in prize.

THE UNITED STATES
vs.
THE STEAMER WILLIAM BAGALEY. } No. 7,630.

To the Honorable E. H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The petition of intervention of Capt. William M. Walker, commanding the United States vessel-of-war De Soto, and of the officers and men attached to said vessel at the time of capture herein, respectfully represents that they were sole naval captors of the vessel and cargo, the subject of this
102 suit, and as such have an equal interest with the libellants in the adjudication herein. They aver that the facts set forth and contained in the libel of information are true and correct, and they join in the prayer hereof for the decree of this court of the condemnation of said captured property as lawful prize of war. And these interventions do further pray that after such decree shall have been duly rendered herein, and said property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this honorable court will proceed to render a final decree and distribution.

L. MADISON DAY, *Captors' Proctor by app't of the Court.*

Intervention of Lieut. J. H. Russell.

District court of the United States, eastern district of Louisiana, in prize.

THE UNITED STATES
vs.
THE STEAMER WILLIAM BAGALEY. } No. 7,630.

To the Honorable E. H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The petition of intervention of Lieut. Commander John H. Russell,
103 commanding the United States vessel-of-war Kennebec, and of the officers and crew attached to said vessel at the time of capture herein, respectfully represents that they were joint naval captors of the vessel and cargo, the subject of this suit, being in chase of the same and within signal distance at the time of the capture, and as such have an equal interest

with the libellants and intervenors in the adjudication herein. They aver that the facts set forth and contained in the libel of information are true and correct, and they join in the prayer hereof for the decree of this court of the condemnation of said captured property as lawful prize of war. And these intervenors do further pray that after said decree shall have been duly rendered, and said property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this honorable court will proceed to render final decree and distribution.

L. MADISON DAY, *Captors' Proctor by app't of the Court.*

Intervention of Capt. John P. Gillis, filed November 18th, 1863.

District court of the United States, eastern district of Louisiana, in prize.

THE UNITED STATES
vs.
THE ST'R WM. BAGALEY. } No. 7,630.

104 To the Honorable E. H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The petition of intervention of Capt. John P. Gillis, commanding the United States vessel-of-war Ossipee, and of the officers and men attached to said vessel at the time of capture herein, respectfully represents that they were joint naval captors of the vessel and cargo, the subject of this suit, being in sight and within signal distance at the time of capture, and in chase of said captured vessel, and as such have an equal interest with the libellants and intervenors in the adjudication herein. They aver that the facts set forth and contained in the libel of information are true and correct, and they join in the prayer hereof for the decree of this court of the condemnation of said captured property as lawful prize of war. And these interventions do further pray that after such decree shall have been duly rendered herein, and said property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this honorable court will proceed to render a final decree and distribution.

L. MADISON DAY, *Captors' Proctor by app't of the Court.*

Intervention of Lieut. W. K. Mayo, filed November 18th, 1863.

District court of the United States, eastern district of Louisiana, in prize.

THE UNITED STATES
vers.
THE ST'R WM. BAGALEY. } No. 7,630.

105 To the Honorable E. H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The petition of intervention of Lieut. W. K. Mayo, commanding the United States vessel-of-war Kanawha, and of the officers and men attached to said vessel at the time of capture herein, respectfully represents that they were joint naval captors of the vessel and cargo, the subject of this suit, being at the time a part of the blockading squadron off Mobile, and as such have an equal interest with the libellanls in the adjudication herein. They aver that the facts set forth and contained in the libel of information are true and correct, and they join in the prayer hereof for the decree of this court of the condemnation of said captured property as lawful prize of war. And these intervenors do further pray that after said decree shall have been duly rendered herein, and said property shall have been sold pursuant thereto, unless the same shall have been previously sold upon interlocutory order, this honorable court will proceed to render a final decree and distribution.

L. MADISON DAY, *Captors' Proctor by app't of the Court.*

[Here follows map, page 106.]

107 *Testimony of L. W. Robinson, filed November 18th, 1863.*

Louis W. Robinson sworn, says: I was an officer on the Kennebec in July last, Capt. John H. Russell commanding. The gunboat Aroostook constituted part of the blockading squadron off the port of Mobile at the time of the capture of the Bagaley. The Kanawha also constituted part of it. Theodorus Bailey was not then in command of any vessel off Mobile. I think he was stationed at Key West, in command either of the San Jacinto or the Magnolia.

Sworn to before me November 18th, 1863.

ALFRED SHAW, *Special Prize Commissioner.*

From minutes of November 18, 1863.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

This cause was this day call up for trial on the claims of the captors—district attorney for libellant, L. M. Day for captors, G. L. Bright for Joshua Bragdon, intervenor—and the counsel for intervernor having objected
108 to the trial on the ground that there was pending and undecided a motion made by said intervenor to take the testimoney of witnesses residing in Indiana, the court ruled that said intervenor had no right to the commission, overruled the motion, and ordered the trial to proceed. And after hearing the deposition of L. M. Robinson, 3rd ass't engineer on gunboat Kennebec, the prize commissioner was ordered to hear further evidence and report the same to the court.

Bill of exception, filed November 18*th*, 1863.

Before the United States district court for the eastern district of La.

THE UNITED STATES
vers.
ST'R WM. BAGALEY, &C. } No. 7,630.

Be it remembered, that on the 18th day of Nov'r, 1863, this cause was called for trial on the claim of the captors and of Joshua Bragdon, intervenor, when counsel for the intervenor, Wm. Bragdon, opposed the trial and moved for a continuance, on the ground that there was pending and undecided a motion, made by said Bragdon, for a commission to take the testimony of his witnesses residing in New Albany, Indiana; that the testimony of said witnesses was material and indispensible to establish the claim
109 of Wm. Bragdon, intervenor. But the court ruled that the intervenor, Wm. Bragdon, had no right to the commission, refused to grant the commission, and ordered the trial to proceed; to which ruling of the court counsel for Wm. Bragdon tenders this his bill of exception, for the signature of the court.

E. H. DURELL, *Judge.*

Bill of district attorney, filed November 19*th*, 1863.

U. S. district court.

THE UNITED STATES
vs.
THE STEAMER BAGALEY, TACKLE, &C., AND CARGO. }

For all services rendered as district attorney in the above-entitled case, (the proceeds being $218,540 73,) three per cent. of the amount, $6,556 00.

New Orleans, Nov. 19th, 1863.

RUFUS WAPLES, *U. S. Dis't Att'y.*

110 *Letter from W. K. Mayo, and doc'ts, filed November 27th, 1863.*

U. S. S. KANAWHA, *Blockade of Mobile, Oct. 28th, 1863.*

GENTLEMEN: I had the honor of addressing Judge Durell on July 25, 1863, from this place, in regard to the claim of this ship to share as joint captor of the st'r Wm. Bagaley and cargo, sent to his court for adjudication as prize. I now have the honor to forward to you the grounds on which we claim, and the facts in the case, sworn to before Commodore H. K. Thatcher, who has no interest in the case; also affidavits in proof of our presence on the blockade of Mobile on the night of July 17 and 18, 1863, the night of the escape of the W. Bagaley, and that this ship, Kanawha, did constitute part of the blockading force off Mobile July 17 to July 22, 1863, both days inclusive.

The law directs, in cases of claims of this import, that the prize commissioner shall proceed, under the direction of the court, to take the requisite evidence, and as no oral testimony can be admitted, I nominate to you Lt. Commander Franklin and J. H. Russel, now in New Orleans, who can testify that this ship constituted a part of the blockade here at the time of the capture of the W. Bagaley.

Prize list has been forwarded to the Hon. Sec'y of the Navy. I hope that you will admit these papers upon the files of the court and commission,
111 and give them due attention, as I suppose the interlocutory decree of condemnation has been made.

Respectfully, your ob't serv't,

W. K. MAYO, *Lieut. Com'd'r.*

U. S. PRIZE COMMISSIONERS, *New Orleans.*

Grounds on which the officers and crew of the U. S. S. Kanawha establish their claims to share as joint captors of the steamer Wm. Bagaley.

1st. Captures made by ships which are associated in the same service, or engaged in a joint enterprize under the orders of the same superior officer, as a general rule, enure to the benefit of all, and all are entitled to share in each other's prizes. Therefore if one ship of a squadron takes a prize in the night, unknown to the rest, or even at noonday, the whole fleet will be entitled to share, although the capture may have been made at a distance out of sight of most of the ships. (Forsigheid, 3 Rob., p. 311; Guillaume Tell, Edw., p. 6; the Empress, p. 368, 1 Dod. S. C., Edw., p. 124.)

2nd. Where a fleet is employed in a blockade the service is considered as joint, and all the ships are entitled to share in all captures, although all the ships have not joined in the chase, and the capture has been made after the chase, at a great distance from the blockaded port. (Guillaume Tell, Edw., p. 6; Forseigheid, Edw., p. 124; Phillemore Int. Law, vol. 3, p. 360.) This rule is invariable and of one character; it is one and the same everywhere.

3rd. The accompanying affidavits that the U. S. S. Kanawha did
112 constitute a part of the blockading force off Mobile at the time of the capture of the Wm. Bagaley.

W. K. MAYO, *Lieut. Commander.*

The U. S. steamer Kanawha formed a part of the blockading force of Mobile, and was present doing duty as such, on active service from July 17, 1863, to July 22, 1863, both days inclusive. That between these dates of July 17th, 1863, and July 22, 1863, the steamer Wm. Bagaley, making egress from the port of Mobile by way of the swash channel, was chased by the U. S. steamers Aroostook, Kennebec, and Ossipee, all associate blockading ships with the U. S. S. Kanawha at the time. And at the time of the cap-

ture as prize of the steamer William Bagaley the U. S. S. Kanawha was doing duty as an active blockading vessel of the port of Mobile.

W. K. MAYO,
Lieut. Commander U. S. S. Kanawha.

HENRY W. MILLER, *Lieut.*
RICH'D M. BARNENAN, *Ch'f Eng.*

Sworn to and subscribed before me this 31st day of October, 1863.

H. K. THATCHER,
Commodore, Com'd'g Div'n W. G. B. S.

113 The U. S. S. Kanawha formed a part of the blockading force off Mobile, on active duty, and was present on such duty from July 17, 1863, to July 22, 1863, both days inclusive. And at the time of the capture of the steamer Wm. Bagaley, by the vessels composing part of the squadron blockading Mobile, the U. S. S. Kanawha did form part of this squadron, and was associated on common service with them, as active blockaders of the port of Mobile.

HENRY W. MILLER, *Lieut. U. S. N.*
RICHARD M. BARNENAN, *Chief Eng'r.*

Sworn to and subscribed before me this 31st day of October, 1863.

H. K. THATCHER,
Commodore, Commanding W. G. B. Squadron.

Report of prize commissioners, filed Nov. 30, 1863.

U. S. district court.

UNITED STATES *vers.* ST'R WM. BAGALEY. } No. 7,630.

114 To the judge of the United States district court for the eastern district of Louisiana:

The undersigned, prize commissioners, respectfully report that since the reference to them to take proof upon the questions of relative force, and what public ships-of-war are entitled to share, no depositions have been taken before them, except that of L. W. Robinson, marked A, hereinafter alluded to.

We have therefore limited ourselves to examining the evidence in preparatorio, and papers on file in this case, for the purpose of reporting to the court, as a basis for its judgment, such facts as are undisputed, reserving all facts not established and all questions of law for the further action and decision of the court.

Interventions to share in the proceeds have been filed by the attorney for captors, on behalf of the sloop-of-war Ossipee, the De Soto, the Kennebec, the Aroostook, the Kanawha, and Theodorus Bailey, commanding eastern Gulf blockading squadron, and flag-ship San Jacinto.

Ossipee.

It results from the testimony in preparatorio that the Bagaley was brought to by a gun from the Ossipee, and afterwards taken in charge by a prize crew from her, after having been first boarded and taken in charge by a boat's crew from the De Soto. That the Ossipee was in pursuit, and
115 within sight and signal distance, and therefore entitled to share, seems undisputed.

De Soto.

This vessel was in pursuit, and the first to board. A dispute appears to have arisen between the officers of this vessel and those of the Ossipee, as

to which should be regarded as the capturing vessel, which seems to be of no importance in determining any judgment to be rendered by this court. We do not see any contest or question as to her right to share in the proceeds of the capture, she being in pursuit and within sight and signal distance.

Kennebec.

This vessel was in pursuit, and within sight and signal distance, and is entitled to be entered in the judgment of the court as a vessel entitled to share.

Aroostook.

This vessel claims to be a joint captor, on the ground that her commander, S. R. Franklin, apprized the squadron at anchor off Mobile of the presence of the Bagaley, and was one of three vessels which started in pursuit, and though not in sight at the capture, yet he considers that the Aroostook was one of a joint enterprise by which the capture was made. (See papers marked I.) The attorney for captors intervenes on her behalf, on the ground that she was of the blockading fleet off the port of Mobile, whence the captured vessel ran, and on duty in this service at the time of capture.

116 The Aroostook has sent to this court two extracts from her log-book, showing her position at various times during the pursuit of the Bagaley, which are herewith submitted, marked D 1 and D 2. The depositions of Louis W. Robinson, marked A, testifies that the Aroostook was part of the blockading squadron off the port of Mobile. It will be for the court to decide whether the grounds set forth are sufficient in law to give a right to share in the proceeds, and if it is, whether further proof of the Aroostook's participation in the joint enterprise of capturing the prize is necessary. There is no allegation made, nor proof furnished positive or negative as to whether the Aroostook was within signal distance or not; and your prize commissioners are unable to come inferentially to a conclusion on the subject, although a practical navigator might, from an inspection of the extracts from the log-book, the map marked G, and the other papers and statements on file.

Kanawha.

This vessel claims a share of the proceeds on grounds similar to those of the Aroostook. The deposition of L. W. Robinson, marked A, testifies that she was part of the blockading squadron off the port of Mobile, and the officers of the vessel request that the testimony of Lieut. Commander Franklin and J. H. Russell be taken before the prize commissioners. We call the attention of the court to the sworn statement of Commodore Thatcher,

117 attached to document marked H. She does not appear to have been in pursuit of the Bagaley, but doing duty on the station in other respects, similar to the case of the Aroostook.

Theodorus Bailey and San Jacinto.

Acting Rear Admiral Theodorus Bailey, commanding the eastern Gulf blockading squadron, writes a letter, marked E, and files an intervention through the attorney for captors, which intervention claims on behalf of himself and the officers and crew attached to the flag-ship San Jacinto. It claims that the San Jacinto was a part of the blockading squadron, though absent at the time on duty. L. W. Robinson testifies, marked A, that Theodorus Bailey was not then in command of any vessel off Mobile. He thinks he was stationed at Key West, in command either of the San Jacinto or the Magnolia. Acting Rear Admiral Bailey's claim as commander of the squadron is a matter for the Navy Department to dispose of after the decree of this

court. The special attention of the court is necessary, as to the question of law, of the right of the San Jacinto to share, if absent from the station on duty, and whether proof is necessary to establish her claim, if such a claim is valid in law.

MICHAEL HAHN,
ALFRED SHAW, (*special*) *Prize Commissioners.*

118 *Rule of court, filed Nov. 30th, 1863.*

Ordered by the court that the 5th of the "standing interrogatories to witnesses examined in preparatorio," be amended by adding after the words "Were any other and what ships in sight at the time of the capture?" the words "Were any other and what ships within signal distance at the time of the capture? What do you mean by signal distance, and what kind of signals do you refer to?"

Submission on claims of captors, from minutes of Nov. 30, 1863.

UNITED STATES
vs.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630.

This cause came again before the court on the claim of the captors and the report of the prize commissioners in relation to the vessels entitled to share in the prize, &c.—district attorney, for libellant, L. M. Day for captors—and after hearing counsel, the court took time to advise.

119 *Answer of district attorney, filed December 1st, 1863.*

Pending in the U. S. district court for the eastern district of Louisiana, in prize.

UNITED STATES
vs.
STEAMER WM. BAGALEY, TACKLE, &C., AND CARGO. } No. 7,630.

To the Honorable Edward H. Durell, judge of the district court of the United States for the eastern district of Louisiana:

The answer of Rufus Waples, attorney for the United States of America for the said eastern district of Louisiana, who prosecutes herein for the United States in this behalf, to said claim of intervention, exhibited by Joshua Bragdon in this cause.

This defendant, Rufus Waples, att'y of the United States of America for said district, reserving to said United States all right of exception to said bill and claim of intervention of said Joshua Bragdon, for answer thereto, or unto so much and such parts thereof as he is advised is or are material or necessary for him to make answer unto, answering, saith that this defendant, att'y as aforesaid, in behalf as aforesaid, neither admits nor denies that said intervenor, Joshua Bragdon, is a loyal citizen of the United States, not being within his knowledge. And the defendant, att'y as aforesaid, in behalf as aforesaid, expressly denies that said intervenor, Joshua Bragdon, is a member of the firm of Cox, Brainard & Co., who were owners of said steamer Wm. Bagaley, as stated in said intervenor's bill. And this defendant, attorney as aforesaid, in behalf as aforesaid, further answering, denies that said Joshua Bragdon is interested in any manner whatever, as part owner or otherwise, in said st'r Wm. Bagaley, as stated in his said bill of intervention.

120

And this defendant, att'y as aforesaid, in behalf as aforesaid, denies that said Joshua Bragdon is interested in any manner in the cargo of said Wm. Bagaley, as stated in his said bill. And this defendant, att'y as aforesaid,

in behalf as aforesaid, saith that he admits that steamer Wm. Bagaley was used by the so-called Confederate States government, and was the property of said rebel government on or about the year 1862. Without this, that there is any other matter, cause, or thing in said intervenor's bill material for this defendant, att'y as aforesaid, to answer unto, and not answered, confessed, traversed, avoided, or denied, is true. All of which matters and things this def't, att'y as aforesaid, is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays that this honorable court will decree that said intervenor's bill and claim be dismissed with costs and charges, in this behalf wrongfully sustained.

As will ever pray.

RUFUS WAPLES, *U. S. District Att'y.*

121 *Order of intervention fixed, from minutes of December 7th, '63.*

UNITED STATES
vers.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630.

On motion of the district attorney, it is ordered that the intervention of Joshua Bragdon be fixed for hearing on to-morrow, 8th inst., at 10 a. m.

Exception of district attorney, filed December 8th, 1863.

United States district court, in prize.

UNITED STATES
vs.
ST'R WM. BAGALEY, TACKLE, &C., AND CARGO.

The exception of the United States, libellant herein, represented by Rufus Waples, U. S. district attorney, appearing herein in behalf of said libellant, respectfully represents that the claim and intervention of Joshua Bragdon herein discloses no cause of action; that, on the contrary, it admits that the property seized herein is enemy's property, under the law of nations and under the acts of Congress.

Wherefore the exception prays that the claim and intervention of the said Joshua Bragdon be dismissed with costs; and he prays for general relief.

RUFUS WAPLES, *U. S. Dis't Attorney.*

122 *Submission on intervention, from minutes of December 8, '63.*

UNITED STATES
vs.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630. In prize.

The intervention filed by Joshua Bragdon came on this day for hearing—dis't att'y for libellant, G. L. Bright for intervenor—and the court having overruled the exception this day filed by the libellant, on the ground that it comes too late, the intervention was taken up on its merits, when the district attorney made the following admission, to wit: "On the trial of the merits of the intervention of Joshua Bragdon the district attorney admits all the facts alleged in the libel of intervention." And after hearing argument of counsel the court took the matter under advisement, and allowed 10 days from this day to intervenor's proctor to furnish his authorities.

Special report of prize commissioners, filed December 15th, 1863.

United States district court.

UNITED STATES
vers.
ST'R WM. BAGALEY, &C. } No. 7,630.

123 The undersigned, prize commissioners, adopting the suggestion of the

court that they should present a definite recommendation and report, to serve as a basis of the judgment of the attorney for captors, that the law is definite and limits the right to share the proceeds to such vessels as are within signal distance, respectfully reports that the public vessels-of-war Ossipee, De Soto, and Kennebec, being the only vessels shown to be within signal distance, or basing their claims upon that fact, are duly entitled to be adjudged captors, and to enter into the judgment of the court as such. We also find that the fact of the capturing vessels being of superior force to the vessel captured is evident and undisputed.

MICHAEL HAHN,
ROBERT RITCHIE, *Prize Commissioners.*

Decree concerning captors, from minutes of December 15, '63.

UNITED STATES
vers.
STEAMER WILLIAM BAGALEY, TACKLE, &C., AND CARGO. } No. 7,630.

The court being satisfied that the public vessels-of-war Ossipee
124 De Soto, and Kennebec are entitled to share in the prize; that no other U. S. war vessel was within signal distance at the time of the capture, and that the prize was of inferior force to the capturing vessels, it is ordered and decreed that the aforesaid ships-of-war, Ossipee, De Soto, and Kennebec, be, and they are hereby, declared and adjudged to be entitled to share in the capture of the steamer William Bagaley and cargo.

Judgment dismissing claim of Bragdon, from minutes of Jan. 11*th*, 1864.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

For the reasons orally assigned by the court, it is ordered, adjudged, and decreed that the intervention and claim of Joshua Bragdon be rejected and dismissed with costs.

Petition of appeal, filed January 14*th*, 1864.

THE UNITED STATES
vers.
STEAMER WM. BAGALEY AND CARGO, JOSHUA BRAGDON, int. } No. 7,630.

125 To the honorable the judge of the district court of the United States for the eastern district of Louisiana, in prize:

The petition of Joshua Bragdon, intervenor in the above-entitled cause, respectfully represents that he is aggrieved by the decree herein rendered against him on the 11th day of January, 1864, and is informed that there is error therein to his prejudice.

Wherefore he prays that an appeal be allowed him therefrom to the next term of the circuit court of the United States for the 6th circuit and eastern district of Louisiana, the same to operate as a supersedeas, upon his giving bond and security, conditioned according to law, in such amount as the court may determine.

GEO. L. BRIGHT, *Proctor for Joshua Bragdon.*

Order for appeal, from minutes Jan. 14, 1864.

UNITED STATES
vers.
ST'R WM. BAGALEY, &C., AND CARGO. } No. 7,630. On intervention of Joshua Bragdon.

126 On motion of G. L. Bright, proctor for Joshua Bragdon, intervenor, and on presenting and filing a petition, praying an appeal from the

decree rendered against the said intervenor on the 11th inst. to the next term of the circuit court of the United States for the 6th circuit and eastern district of Louisiana, the same to operate as a supersedeas, it is ordered that the appeal be allowed as prayed for, on intervenor Joshua Bragdon giving bond, conditioned according to law, in the penal sum of sixty thousand dollars, ($60,000,) with good and solvent sureties thereon.

127 United States dist. court, east. dist. of La.

UNITED STATES
vs.
ST'R WM. BAGALEY AND CARGO, JOSHUA BRAGDON, intervenor. } No. 7,630.

The United States of America to the captors interested in this case, represented by L. M. Day, esq., their attorney, greeting :

You are hereby cited and admonished to be and appear before the circuit court of the United States for the 6th circuit and eastern district of Louisiana, at its next term, to be holden in the city of New Orleans, State of Louisiana, to answer the appeal taken by Joshua Bragdon, intervenor in this cause, and that then and there you show cause, if any there be, why the judgment rendered against the said intervenor should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. Durell, judge, this 14th day of January, in the year of our Lord 1864, and the 88th of the American independence.

K. LOEW, *D'y Cl'k.*

128 Rec'd 19th January, 1864, and served same day on L. M. Day, esq'r, at his office.

J. S. BADGER, *D'y U. S. Marshal.*

Filed Jan'y 26th, 1864.

F. B. VINOT, *D'y Cl'k.*

129 United States dist. court, east. dist. of La.

UNITED STATES
vs.
ST'R WM. BAGALEY AND CARGO, JOSHUA BRAGDON, intervenor. } No. 7,630.

The United States of America to Rufus Waples, esq., U. S. dist. att'y, greeting :

You are hereby cited and admonished to be and appear before the circuit court of the United States for the 6th circuit and eastern district of Louisiana, at its next term, to be holden in the city of New Orleans, State of Louisiana, to answer the appeal taken by Joshua Bragdon, intervenor in this cause, and that you show cause then and there, if any there be, why the judgment rendered against the said intervenor should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable E. H. Durell, judge, this 14th day of Jan'y, in the year of our Lord 1864, and the 88th of the American independence.

K. LOEW, *D'y Cl'k.*

130 Rec'd 19th January, 1864, and served same day on R. Waples, esq'r, at his office.

J. S. BADGER, *D'y U. S. Marshal.*

Filed Jan'y 26th, 1864.

F. B. VINOT, *D'y Cl'k.*

131 *Appeal bond, filed Jan. 19th, 1864.*

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

District court of the United States, in admiralty.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

Know all men by these presents that we, Joshua Bragdon, as principal, and J. W. Goslee, of the city of New Orleans and State of Louisiana, as surety, are held and firmly bound unto the United States of America, and all parties claiming an interest in the above-entitled suit, in the sum of sixty thousand dollars, to be paid to the said United States and parties in interest; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at New Orleans the 19th day of January, 1864.

Whereas the above-named Joshua Bragdon, intervenor, has appealed to the next term of the circuit court of the United States for the 6th
132 circuit and eastern district of Louisiana, from a final decree of the district court of the United States for said district, rendered on the 11th day of January, 1864, in the above-entitled cause, dismissing the petition of intervention of the said Joshua Bragdon:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his appeal good, then this obligation to be void; otherwise, the same shall be and remain in full force and virtue.

J. BRAGDON.

Witness: K. LOEW, *D'y Clerk.* J. W. GOSLEE.

J. W. Gosslee, the surety on the within bond, being duly sworn, says that he is worth the amount of the within bond ($60,000) over and above all his liabilities.

J. W. GOSLEE.

Sworn to and subscribed before me this 19th January, 1864.

K. LOEW, *D'y Clerk.*

133 *Additional appeal bond, filed January 21st, 1864.*

Know all men by these presents that we, Joshua Bragdon, by his attorney, G. L. Bright, as principal, and J. W. Goslee and David C. McCann, both of the city of New Orleans, State of Louisiana, as sureties, are held and firmly bound unto the United States of America, and all parties claiming an interest in the above-entitled suit, in the full and just sum of sixty thousand dollars, to be paid to the said United States and parties in interest, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 21st day of January, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas lately at a district court of the United States in and for the eastern district of Louisiana, in a suit depending in said district court, wherein the United States of America and the captors in interest are plaintiffs, the steamer Wm. Bagaley and cargo are defendants, and Joshua Bragdon is intervenor, judgment was rendered against the said Joshua Bragdon, intervenor, on the 11th January, 1864, dismissing his intervention
134 filed herein, and the said Joshua Bragdon having filed an appeal from

said judgment, and filed a copy thereof in the clerk's office of the said district court to reverse the judgment in the aforesaid suit, and a citation directed to the said libellants and captors, citing and admonishing them to be and appear at a circuit court of the United States, to be holden at New Orleans, on the next term of said circuit court:

Now the condition of the above obligation is such that if the said Joshua Bragdon, intervenor, shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

JOSHUA BRAGDON, [L. S.]
By his Proctor, Geo. L. Bright.
J. W. GOSLEE, [L. S.]
No. 2, Front st., bet. Com. and Gravier.
D. C. McCAN, [L. S.]
Fulton, bet. Notre Dame and Julia sts.

Sealed and delivered in presence of—
K. LOEW, *D'y Clk.*

David C. McCann, one of the sureties on the within bond, being duly sworn, says he is worth the sum of forty thousand dollars over and above all his liabilities.

D. C. McCANN.

Sworn to and subscribed before me this 21st Jan'y, 1864.
K. LOEW, *D'y Clerk.*

135 *Motion to rescind appeal to circuit court, from minutes of February 1st, 1864.*

UNITED STATES
vs.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

On motion of G. L. Bright, esq., proctor for intervenor, and on suggesting to the court that an appeal was applied for and allowed to him from the decree herein rendered against him on the eleventh day of Jan'y, 1864, to the next term of the circuit court of the United States for the 6th circuit and eastern district of Louisiana, whereas by a recent act of the Congress of the United States, approved 3rd March, 1863, the said appeal should have been taken directly to the Supreme Court of the United States, it is ordered that the order so entered, and the appeal bond given by intervenor in conformity thereto, be vacated and annulled.

Petition of appeal to Sup. Court, filed Feb. 1st, 1864.

District court of the United States for the eastern district of Louisiana, in prize.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO, JOSHUA BRAGDON, INTERVENOR. } No. 7,630.

To the honorable the judge of the district court of the United States for the eastern district of La.:

136 The petition of Joshua Bragdon, intervenor in the above-entitled cause, with respect, represents that he is aggrieved by the decree herein rendered against him on the 11th day of January, 1864, and is advised that there is error therein to his prejudice. Wherefore he prays that an appeal be allowed him therefrom to the next term of the Supreme Court

of the United States, and that the same may operate as a supersedeas, upon his giving bond and security, conditioned according to law, in such sum as the court may direct.

Order for appeal, from minutes of Feb. 1st, 1864.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

On motion of Geo. L. Bright, esq., proctor for intervenor, Joshua Bragdon, and on presenting and filing his petition praying an appeal to the next term of the Supreme Court of the United States from the decree rendered against him on the 11th day of January, 1864, and that the same may operate as a supersedeas, it is ordered that the appeal be allowed as prayed for, on said intervenor giving bond conditioned according to law with good and solvent security in the penal sum of sixty thousand dollars.

137 *Citation of appeal.*

United States district court, eastern district of Louisiana, in prize.

UNITED STATES
vs.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

The United States of America to Capt. Jno. P. Gillis and others, of sloop-of-war Ossipee, Capt. Wm. Walker and others, of the st'r De Soto, and Lieutenant Jno. H. Russell and others, of the Kennebec, captors in this case, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, on the first Monday in December next, to answer the appeal taken by Joshua Bragdon, intervenor in this cause, and that you show cause then and there, if any there be, why the judgment rendered against the said Joshua Bragdon, intervenor, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. Durell, judge, this 1st day of February, in the year of our Lord 1864, and the 88th of the American independence.

E. H. DURELL, *Judge.*

138 Rec'd 3d February, 1864, and same day, month, and year served copy of the within citation of appeal on L. M. Day, esq'r, att'y for captors, personally.

J. S. BADGER, *D'y U. S. Marshal.*

139 *Citation of appeal.*

United States district court, eastern district of Louisiana, in prize.

UNITED STATES
vs.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

To the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, on the first Monday of December next, to answer the appeal taken by Joshua Bragdon, intervenor in this cause, and that you show cause then and there, if any there be, why the judgment rendered against the said Joshua Bragdon,

intervenor, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable E. H. Durell, judge, this 1st day of February, in the year of our Lord 1864, and the 88th of the American independence.

E. H. DURELL, *Judge.*

140 Received Feb'y 3d, 1864, and same day, month, and year served copy of the within citation of appeal on R. Waples, esqr., personally, U. S. district attorney.

J. S. BADGER, *D'y U. S. Marshal.*

141 *Appeal bond, filed February 6th,* 1864.

UNITED STATES
vers.
ST'R WM. BAGALEY AND CARGO. } No. 7,630.

Know all men by these presents that we, Joshua Bragdon, intervenor, by G. L. Bright, his attorney, as principal, and J. W. Goslee and David C. McCann, both residents of the city of New Orleans, State of Louisiana, as sureties, are held and firmly bound unto the United States of America, and all parties claiming an interest in the above-entitled suit, in the full and just sum of sixty thousand dollars, to be paid to the said United States and parties in interest, their certain attorneys, executors, administrators, or assigns to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 6th day of February, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas lately at a district court of the United States in and for the eastern district of Louisiana, in a suit depending in said district
142 court, wherein the United States of America and the captors in interest are plaintiffs, the steamer Wm. Bagaley and cargo are defendants, and Joshua Bragdon is intervenor, judgment was rendered against the said Joshua Bragdon, intervenor, on 11th January, 1864, dismissing his intervention filed herein, and the said Joshua Bragdon having taken an appeal from said judgment of said district court to the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation directed to the said libellants and captors citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such that if the said Joshua Bragdon, intervenor, shall prosecute his writ to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; else, to remain in full force and virtue.

GEO. L. BRIGHT, *Att'y for Appellant.* [L. S.]
J. W. GOSLEE. [L. S.]
D. C. McCANN. [L. S.]

Sealed and delivered in the presence of—
K. LOEW, *D'y Clerk.*

J. W. Goslee and D. C. McCann, sureties on the within bond, being sworn, say that they are residents of the city of New Orleans, and are worth the sum of sixty thousand dollars over and above all their liabilities.

J. W. GOSLEE.
D. C. McCANN.

143 Sworn to and subscribed before me this 6th day of February, 1864.

K. LOEW, *D'y Clerk.*

United States district court, eastern district of Louisiana, city of New Orleans.

I, Kilian Loew, deputy clerk of the United States district court for the eastern district of Louisiana, do hereby certify that the foregoing one hundred and forty-two pages contain and form a true, correct, and complete transcript of the original record of said court in the case, in prize of the United States of America vs. the steamer William Bagaley and cargo, No. 7630, of the docket of said court.

In testimony whereof, I hereto set my hand and the seal of said court at New Orleans this 25th day of February, A. D. 1864, and the 88th year of the American independence.

K. LOEW, *D'y Clerk.*

Filed January 26th, 1865.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1866.

No. 157.—IN PRIZE.

THE STEAMER WILLIAM BAGALEY AND CARGO

vs.

THE UNITED STATES.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Petition, Affidavits, Statement, and Argument for Julius Hessee, and others.

HENRY CRAWFORD,
S. S. COX,
JOSEPH J. LEWIS,
Counsel.

WASHINGTON:
INTELLIGENCER PRINTING HOUSE,
401 and 401 D Street, near 7th.
1867.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

THE UNITED STATES
vs.
STEAMER WILLIAM BAGALEY AND CARGO.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

PETITION.

The Petitioners, intervenors, Julius Hessee, Moses Baring, Robert Otis, James M. Brainard, and Charles P. Gage, (who, together with Joshua Bragdon, heretofore and now an intervenor herein,) constituted the firm of Cox, Brainard & Co., by leave of the Court for that purpose first had and obtained, respectfully represent—

That they are now, and have been for many years, residents of the city of Mobile, State of Alabama, and citizens of the United States; that they, together with said Joshua Bragdon, constituted the firm of Cox, Brainard & Co., which, at the time of the breaking out of the rebellion against the Government of the United States, and for a long time prior thereto, was doing business as such firm in said city of Mobile; that the said firm was an old established house in Mobile, whose partners changed from time to time, while the firm name remained the same; that at the time the said vessel was enrolled, it was enrolled as the property of the firm by F. M. Johnson, then one of the firm, (reference being had to Exhibit A, hereunto annexed, dated 3d of February, 1857, will more fully appear;) that at the time of the breaking out of said rebellion, and for some time prior thereto, the said firm, as first abovenamed, to wit: the petitioners and said Bragdon, were the sole owners of the said steamer William Bagaley, her engines, tackle, furniture, and appendages; and that said petitioners were the owners of the cargo which was upon said steamer at the time of capture, with said Bragdon, who claims the one-sixth thereof; that the remaining five-sixths of said vessel, engines, tackle, furniture, appendages, and cargo were the property of the petitioners, who, at the time the vessel sailed, had the whole control thereof; and further, that, at the time she was lading and when she sailed, and at the time of the capture, the petitioners still continued to be the owners of the said five-sixths thereof; that at the present time the same belongs to said peti-

tioners, or would have so belonged in case the same had not been seized and taken; and the proceeds thereof, now in the registry and under the control of the Court, should, and now rightfully do belong to the said petitioners; and that neither the United States, nor the captors herein, nor any person whosoever, other than the said claimants, at any period of time have, hath, or had any just right, title, or interest in and to the said five-sixths of said vessel, engines, furniture, tackle, appendages, and cargo, or to the proceeds thereof, for the reasons hereinafter stated.

Your petitioners further show, that it is true as stated in the record herein; that the said vessel was engaged in running the blockade, and was captured as prize, on or about the 18th day of July, 1863, with the appendages, cargo, &c.; and, after said capture, brought to the port of New Orleans, and within the jurisdiction of the United States District Court for the Eastern District of Louisiana, and the same was libelled in said Court on the 25th day of July, 1863, and process issued, as fully set forth in said record; that on the 31st day of August, 1863, the said Joshua Bragdon, by petition of intervention filed in said Court, claimed the one-sixth of the whole value of said vessel, cargo, &c., alleging that he was a member of said firm of Cox, Brainard & Co., and that said firm, at the time of the breaking out of said rebellion, were sole owners of said vessel, cargo, &c.; and that afterwards, on the 8th day of December, 1863, on the trial of the merits of said intervention of Joshua Bragdon, the District Attorney, representing the Government of the United States, caused to be entered on the minutes of said Court an "admission of all the facts alleged in the libel of intervention" of said Bragdon, whereby the facts hereinbefore stated as to the ownership of said firm were distinctly admitted; that afterwards, and while the said petitioners were in said city of Mobile, and not within the jurisdiction of said Court, but in territory hostile thereto, by reason of the state of war and rebellion, and after the proceedings set forth in said record, and without any opportunity for the petitioners to prefer their claim, and while they were under the disabilities hereinafter metioned, having no standing in said Court, and no right to make such claim, a decree was entered, bearing date the 11th day of January, 1864, rejecting and dismissing said intervention of said Bragdon, which decree follows an interlocutory decree of said Court of August 17, 1863, condeming said vessel, &c. as prize; that afterwards, to wit: on the 6th day of February, 1864, and while said disabilities remained, and said petitioners were within the said territory hostile to the jurisdiction of said Court, an appeal was effectuated, in accordance with the orders of said Court, and in pursuance of law; and the said decrees thereby superseded and the proceedings removed to the Supreme Court of the United States, as stated in said record.

The petitioners further state, that during all the proceedings aforesaid, they were residents of said city of Mobile, Alabama, and that by taking part in the said rebellion against the Government of the United States, they became liable to heavy pains and penalties; that by reason of their conduct in running the blockade by said vessel they were disabled from appearing before said Court and making claim before

or at the time of said condemnation, to said vessel, cargo, &c.; that afterwards, to wit: on the several dates mentioned in exhibit B, (hereto attached and made a part of hereof,) the said petitioners received from the President of the United States their several pardons, with the conditions therein set forth, (reference being had to the said exhibit B will more fully appear;) that by the force and effect of said pardons the said petitioners are relieved fully from all the pains and penalties to which they were liable by reason of taking part in said rebellion and in running said blockade, and all other "offences by them committed in the said rebellion."

Your petitioners state that they have respectively accepted said pardons, in accordance with the terms, and have complied with the conditions thereof; and refer to their affidavit in said exhibit B. and the letters of acceptance therein, and the certificates of the Secretary of State, for proof thereof.

They ask leave to intervene in this proceeding, and that, after the payment of the costs, their proportion of the proceeds of the sale of said vessel, cargo, &c., may be restored to them.

HENRY CRAWFORD.
LEWIS & COX,
J. J. LEWIS,
Proctors.

[EXHIBIT A.]

ENROLMENT—PERMANENT.

[No. 12.]—Enrolment in conformity to an act of Congress of the United States of America, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," approved February 18, 1793.

F. M. Johnson, of the firm of Cox, Brainard & Co., State of Alabama, having taken or subscribed the oath required by the said act, and having sworn that the said firm of Cox, Brainard & Co., are citizens of the United States, and sole owners of the ship or vessel called the William Bagaley, of Mobile, whereof J. C. Sinnott is at present master, and, as he hath sworn, is a citizen of the United States, and that said ship or vessel was built at Bellevernon, State of Pennsylvania, in the year one thousand eight hundred and fifty-four. as per enrolment, No. 77, issued at the port of Pittsburg May 1, 1856, now surrendered, property and district changed; and said enrolment having certified that the said ship or vessel has one deck and no mast, and that her length is one hundred and seventy-three feet; her breadth thirty-two and nine twelfths feet; her depth seven and six-twelfths feet; and that she measures three hundred and ninety-six and thirty ninety-five hundredths tons; that she is a steamer, sterned square; has a sharp head; and that the said F. M. Johnson having agreed to the description and admeasurement above specified, and sufficient security

having been given according to the said act, the said steamer has been duly enrolled at the port of Mobile.

Given under our hands and seals of office, at the port of Mobile, [SEAL.] this 3d day of February, in the year one thousand eight hundred and fifty-seven.

I hereby certify that this is a correct copy of the original now on file in this office.

ADOLPH POWERS,
Deputy Collector.

[EXHIBIT B.]

Affidavits and Pardons of Petitioners.

THE STATE OF ALABAMA, }
City and County of Mobile. }

Julius Hessee, Moses Waring, Robert Otis, Charles P. Gage, and James M. Brainard, upon their several oaths do say, that they are now and for many years have been citizens, resident in the city and State aforesaid, and also members of the firm of "Cox, Brainard & Co.," the same firm mentioned in the prize case of the United States against the steamer Wm. Bagaley and cargo, now pending in the Supreme Court of the United States.

Said affiants further state, that they have severally received from the President of the United States special pardons, full copies of which are appended to this affidavit; and each of these affiants has accepted said pardon for himself, in accordance with its terms, and has complied with all and singular the conditions thereof; and further say not.

JULIUS HESSEE,
MOSES WARING,
ROBERT OTIS,
JAMES M. BRAINARD,
CHARLES P. GAGE.

STATE OF ALABAMA, }
Mobile County. } *ss:*

I, Joshua S. Secor, a Notary Public, duly commissioned, and residing in the city of Mobile, and State aforesaid, do hereby certify that the abovenamed Julius Hessee, Moses Waring, Robert Otis, Charles P. Gage, and James M. Brainard, who are personally well known to me, subscribed and made oath to the truth of the forgoing statement.

In witness whereof, I have hereunto set my hand and affixed [SEAL.] my official seal, this 21st day of February, A. D. 1867.

J. S. SECOR,
Notary Public.

Copy of warrant of pardon of Julius Hessee.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, greeting:

Whereas Julius Hessee, of Mobile, Alabama, by taking part in the late rebellion against the Government of the United States, has made himself liable to heavy pains and penalties; and whereas the circumstances of the case render him a proper object of executive clemency:

Now, therefore, be it known, that I, ANDREW JOHNSON, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant to the said Julius Hessee a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion. Conditioned as follows:

1st. This pardon to be of no effect until the said Julius Hessee shall take the oath prescribed in the Proclamation of the President, dated May 29, 1865.

2d. To be void and of no effect if the said Julius Hessee shall hereafter at any time acquire any property whatever in slaves, or make use of slave labor.

3d. That said Julius Hessee pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant.

4th. That the said Julius Hessee shall not, by virtue of this warrant, claim any property, or the proceeds of any property, that has been sold by the order, judgment, or decree of a court under the confiscation laws of the United States.

5th. That the said Julius Hessee shall notify the Secretary of State, in writing, that he has received and accepted the above pardon.

In testimony whereof, I have hereunto signed my name and caused the seal of the United States to be affixed.

Done at the city of Washington this seventeenth day of Octo-
[SEAL.] ber, A. D. 1865, and of the independence of the United States the ninetieth.

(Signed) ANDREW JOHNSON.

By the President:

(Signed) WILLIAM H. SEWARD,
Secretary of State.

UNITED STATES OF AMERICA,

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that Julius Hessee, of the county of Mobile, State of Alabama, has deposited in this Department his original oath, bearing date the —— day of ————, 186 , being in the form prescribed by the President's proclamation of May 29, 1865.

In testimony whereof, I, William H. Seward, Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the Department of State to be affixed.

Done at the city of Washington this 13th day of December, [SEAL.] A. D. 1865, and of the independence of the United States of America the ninetieth.

(Signed) WILLIAM H. SEWARD.

MOBILE, ALABAMA, ———, 186 .

Hon. WILLIAM H. SEWARD,
Secretary of State.

SIR: I have the honor to acknowledge the receipt of the President's warrant of pardon bearing date October 17, 1865, and hereby signify my acceptance of the same with all conditions therein specified.

I am, sir, your obedient servant,

JULIUS HESSEE.

UNITED STATES OF AMERICA,

DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the document hereunto annexed is a true copy of the original as filed in this Department.

In testimony whereof, I, William H. Seward, Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the Department of State to be affixed.

Done at the city of Washington the 13th of December, A. D. [SEAL.] 1865, and of the independence of the United States of America the ninetieth.

(Signed) WILLIAM H. SEWARD.

[The pardons of Moses Waring, Robert Otis, Charles P. Gage, and James M. Brainard, together with the certificates of the Secretary of State and acceptance of the parties, are of the same tenor, effect, and form. They are attached to the original petitions on file.]

The concluding certificates are as follows:

THE STATE OF ALABAMA, } *ss:*
Mobile County, }

Before me, Joshua S. Secor, a notary public duly commissioned, and residing in the city of Mobile, appeared Julius Hessee, Moses Waring, Robert Otis, Charles P. Gage, and James M. Brainard, who are all personally known to me, and severally, upon their oaths, do say that the foregoing papers contain a true copy of the President's warrant of pardon and accompanying documents as they were furnished them by the authorities in Washington.

In testimony whereof, I have hereunto subscribed my name [SEAL.] and affixed my official seal at Mobile, the 21st day of February, 1867.

J. S. SECOR, *Notary Public.*

THE STATE OF ALABAMA, } ss:
County of Mobile, }

I, George W. Bond, judge of the Court of Probate in and for said county and State, do hereby certify that Joshua S. Secor was at the time of attesting the same a notary public in and for said county, duly commissioned and qualified, and that, as such, his acts and doings are entitled to full faith and credit, and that his signature is genuine.

In testimony whereof, I have hereunto set my hand and affixed [SEAL.] the seal of said court, at office, this 21st day of February, A. D. 1867.

(Signed) GEO. W. BOND, *Judge.*

TEST AFFIDAVIT.

Henry Crawford, on his oath, says, that he is the agent and attorney of the petitioners, Julius Hessee, Moses Waring, Robert Otis, James M. Brainard, and Charles P. Gage, (who seek to intervene in the case;) that he has read the petition hereto attached, and that the matters propounded in the said petition are true, as he has been informed and verily believes; that the said Hessee, Waring, Otis, Brainard and Gage, are residents of the city of Mobile, and State of Alabama, and are now in said city, and absent and remote from the place of session of this Court, and that their affidavit to the said petition cannot be obtained in time to be used for the purpose of intervention by said petitioners in this case before the hearing thereof.

Affiant further states upon his best information and belief, that the said petitioners, in connection with Joshua Bragdon, constituted the firm of Cox, Brainard & Co., a well-known and long-established house in Mobile; that he is informed and believes that for a long time prior to the breaking out of the rebellion, to wit, from the 3d of February, 1857, and at the time of the breaking out of the same, the said firm was the sole owner of the said steamer Wm. Bagaley, engines, tackle, furniture, and appendages, and that the same was enrolled on said 3d of February, 1857, by F. M. Johnson, then of the said firm, according to the laws of the United States; that in connection with the said Bragdon, (who owned one-sixth,) the said petitioners, at the time the vessel was lading and when she sailed, and when she was captured, to wit, about the middle of July, 1863, were the owners of the said vessel, cargo, tackle, furniture, engines, appendages, &c., the petitioners being the owners of five-sixths thereof, and having at that time the whole control thereof; and that at the present time the same belongs to the said petitioners and said Bragden, in the proportions above stated, or would have so belonged in case the same had not been seized and taken; and the proceeds now in Court, as this affiant is advised, informed, and verily believes, should and do rightfully belong to said petitioners in the proportion above stated; that neither the United States, nor the captors in this case, nor any person whatsoever, other than the said claimants, have, had or hath any just right, title, or interest in

and to the said five-sixths of said property, or the proceeds thereof, in consequence of the pardons of the said petitioners, and for the reasons stated in the petition.

Affiant further states that he was intrusted by said petitioners with the affidavits of said petitioners annexed to said petition, and the copies of the pardons of said petitioners, attested as therein set forth; that he has good reason to believe, and does verily believe, the statements in said exhibit "A" are true, and that the said pardons were accepted and the conditions complied with, and that said petitioners are now entirely relieved of all the pains and penalties referred to in said pardons. Affiant has read the record of this case, and relies upon the same for a portion of the information contained in said petition, particularly with reference to the matters connected with the capture and condemnation of said vessel and cargo.

HENRY CRAWFORD.

Sworn to and subscribed before me this 1st of April, 1867.

[SEAL.] JOHN H. McCUTCHEN, *Notary Public.*

Statement and Argument for Julius Hessee and others.

The steamer Wm. Bagaley, laden with cotton and turpentine, was captured on her voyage from Mobile to Havana, July 18, 1863, taken to New Orleans, and libelled as a prize. The owners were Cox, Brainard and company, of Mobile, Alabama. Joshua Bragdon was originally one of the members of the firm, and as such owned one-sixth of the ship and cargo. He resided in Indiana, and, after the breaking out of the rebellion, took no part in the management or direction of the business of the firm, or in the control of the property. The other five partners used the property as they deemed eligible. Joshua Bragdon intervened in the District Court for his interest. The vessel and cargo were condemned by the Court, December 15, 1863, and Joshua Bragdon appealed to this Court, giving bond in the sum of $60,000, with the usual condition.

At the time of the sentence of condemnation, and for eighteen months afterwards, the State of Alabama, the domicil of these claimants, was a State of the so-called Southern Confederacy, at war with the United States, and the Court in which the said vessel and cargo were condemned was inaccessible to them.

Subsequently these claimants were all pardoned: Joshua Hessee on the 17th of October, 1865; Moses Waring, December 2, 1865; Robert Otis, December 15, 1865; Charles P. Gage, September 12, 1865; and James M. Brainard, March 19, 1866.

The pardons were duly accepted pending the appeal.

By virtue of an interlocutory order the ship and cargo were sold, and the proceeds are now in the Treasury, undistributed and subject to the order of this Court.

The claimants having been fully pardoned, now petition the Court for a restoration to them of five-sixths of the proceeds of the said sale.

Though ordinarily an appellate Court receives no evidence which was not presented on the hearing in the Court below, in all admiralty causes the rule is different. The case, when an appeal is taken and perfected, is heard *de novo*, and there is no final decree till the appellate Court has acted and determined by *decree* the rights of the claimants to the fund.

Berne *vs.* Childs, 10 Peters.
United States *vs.* Schooner Peggy, 1 Cranch, 103.

In the case of the schooner Pinkney the vessel was condemned in the District Court for violation of the act of Congress prohibiting commercial intercourse with certain parts of the Island of St. Domingo. An appeal was taken first to the Circuit Court, and afterwards to this Court. Pending the last appeal the act expired by its own limitation. In delivering judgment, Chief Justice Marshall says: "The majority of the Court is clearly of opinion that in admiralty cases *an appeal suspends the sentence altogether*, and that it is not *res adjudicata* until the final sentence of the appellate Court is pronounced. The cause in the appellate Court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice, not only in cases of appeal from the District to the Circuit Court of the United States, but in this Court also. In prize causes the principle has never been disputed."

Yeaton *vs.* United States, 5 Cranch, 281.

To the same effect are Penhallow vs. Downe, 3 Dall., 87, 119.
Anon., 1 Gall., 22, 25.
U. S. vs. Preston, 3 Peters, 57.
Conk. Ad. Pr., 736.

"The cause is before us as if in the inferior Court."—The Venus, 1 Wheat., 113, a prize case.

Under this rule it is allowable to allege and prove what was not alleged or proved in the Court below.

Rowe vs. Himely, Bu., 313.
The Sarah Jane, 2 Sumner, 209.
The Mariam Flora, 11 Wheat., 1.
The London Packet, 1 Mason, 14.
The Boston, 1 Sumner, 328.
The Samuel, 1 Wheat., 9, 112.
The Jane Wells, 7 Cranch, 22.
The Clarissa Clairborne, 7 Cranch, 107.
The Sally Magee, 3 Wallace, 459.
Molly Shattuck, 3 Cranch, 458.

Until a decree has been actually made the Court is bound to consider every claim against the fund in Court.

Constancia, 10 Jurist, 849.

The case stands, therefore, upon the same footing as though the condemnation had not been decreed in the District Court; and the question presented is, whether this Court, having a grasp upon the fund, and being called on to make distribution, will not, sitting in admiralty as in equity, make an order of distribution, as justice and equity shall appear to require.

The rights of these claimants, as distributees, depend on the force and effect of the several pardons granted them by the President.

The language of these pardons deserves attention. Each recites that the party, "by taking part in the late rebellion against the Government of the United States, has made himself liable to heavy pains and penalties, &c. Now, therefore, I, Andrew Johnson, &c., do hereby grant to the said J. H. a full pardon and amnesty for all offences by him committed arising from participation, direct or implied, in the rebellion." Conditioned as follows: 3d Condition. The party shall "first pay all costs which may have accrued in any proceedings instituted or pending against his person or property before the date of the acceptance of this warrant."

The words of the pardon are comprehensive enough to cover this application. The condition contemplates the remission of penalties in actions directly against property as well as against the person. The phrase "all proceedings instituted or pending against his person or property" can hardly be made more ample. The case here was instituted against the property of the claimants, and was pending; and it therefore comes within the scope of the Executive warrant.

The power of the President to grant such pardon, and thereby to work restoration of all the rights of the grantee, is complete.

"We must give the power" (conferred by the Constitution) the same meaning as prevailed here and in England at the time it found a place in the Constitution." U. S. v. Wilson, 7 Peters 160, Ex parte Wells, 18 How., 307; Cathcart v. Robinson, 5 Peters, 284; Flavelle's case, 8 W. S., 197.

To determine, therefore, the very comprehensive effect of the exercise of this constitutional power, we may properly refer to the English authorities.

Lord Coke says: Pardon is a work of mercy whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical. 3 Just., 233.

A pardon frees the grantee from the punishment, whether of imprisonment, pecuniary penalty, legal disability, or whatever else, the law has provided for the transgression.

Rex v. Greenwalt, 12 Mod., 119.
Strickland v. Thorp, Yelv., 126.
Peters v. Cambridge, 3 Lev., 332.
Thomas v. Sorrell, Vaugh., 330.
Hall v. Vaughen, 5 Coke, 49.
Foxley's case, 5 Coke, 109, (a.)
1 Bish. Crim. L., § 713.
Cuddington v. Wilkins, Hob., 67–81.
2 Hale's P. C., 278.
Crosby's case, Salk., 689.
Rukewood's case, 4 State Trials, 681–7.
7 Bac. Abr., Til. Pard., 412.

The old formula of the charter of pardon was *pardonavit, remisit et relaxavit.*

The word "pardon" includes in itself the word "release," Vin. Ab. Tit. Prerogative, 2, a., § 5; so that all that is not within the exception is pardoned and gone. Marriott's case, Godbolt, 178.

A judgment for rent in arrear, decreed to be vacated by the amnesty in the act of oblivion. Bolton v. Armer, Chan. Ca., 55.

A man struck a juror, and it was awarded that his hand be cut off, and the King granted his land to another; and after, the King pardoned him the amputation of his hand, imprisonment, and whatsoever to him belonged, and then the offender died. The heir brought *scire facias* and had the land. Vin. Ab. Tit.. Prerogative, a., 14, § 1.

Pardon purges the offence *ab initio*. 2 Hawk., P. C., 381, ch. 3, § 3.

The American authorities on the general subject of pardon are equally explicit. As they have been recently considered in this Court in the case ex parte Garland, a mere reference to them will suffice.

3 Story Com., § 1498.
Perkins vs. Stevens, 24 Pick., 278.
Nally vs. Clark, 29 Alab., 439.
Matter of Downey, 10 John 232.

The pardoning power must be construed beneficially. Ex parte Hunt, 5 Eng., 284. Atty. Gen. Speed's opinion, 1863.

The power is very comprehensive, and is subject only to the constitutional exceptions (3 Story Com., § 1498;) and whether before or after condemnation, the pardon includes release. Cope vs. Comm., 28 Penn., 287; Halliday v. State, 5 Gilman, 214.

Atty. Generals's Opinions exhibit and apply the general doctrine.

2 Opin., 330; 3 Opin., 415; 5 Opin., 580; 5 Opin., 729; 2 Opin., 421; 6 Opin., 494.

The Executive, in assuming to restore by pardon, property rights as against pending proceedings *in rem* for forfeiture, has not exceeded his authority. He may remit fines under the revenue laws, 2 Opin., 329; also under the passenger laws, 6 Opin., 393; under the laws relating to slave trade, 4 Opin.. 583; fines upon defaulting jurors, 3 Opin., 317; contempt of Court, 3 Opin., 622. He may release a party from a judgment after security has been given for its payment, 4 Opin., 144.

The Executive may remit penalties in proceedings directly against property. U. S. *vs.* Lancaster, 4 W. C. C. R., 66; U. S. *vs.* Wilson, 7 Pet., 151; Ex parte Wells, 18 How., 307. By direct order or by pardon, which has the effect of a *nolle prosequi*. 5 Opin., 729; 2 Opin., 330; 6 Opin., 494; Princess of Orange's Jewels, Opin. of Att. Gen. Taney, Dec. 28, 1831.

Revenue cases, involving forfeiture and prize cases are analogous. The claim of the Government rests only on the legal transgression of the owner. In prize cases the offences are said to be highly penal—The Sally, 8 Cranch, 382. Especially breach of blockade—Halleck's I. L., 584. There is no distinction between the power of the President in prize cases and revenue cases. In England, it is said, captors bring in prizes subject to the interposition of the Crown. The St. Jean, Edw., 377.

The Crown may at any time before distribution alter or revoke a distribution of prize money. Alexander *vs.* Duke Wellington, 2 Russ. & M., 35; Brummell *vs.* McPherson, 5 Russ., 263; The Indian Chief, 5 C. Rob. 34; The Richmond, 5 C. Rob., 339; The Elsebe, 5 C. Rob., 173.

The President of the United States has the same power. Judge Betts, in the U. S. *vs.* The Napoleon, asserted it, and the defendant was relieved by the Executive after decree.

By 13th section of Confiscation Act the President was empowered to grant pardon and amnesty to persons who participated in the rebellion on such conditions "as he might deem expedient for the public welfare."

President Lincoln's proclamation, December 8, 1863, granted full pardon, "with restoration of all rights of property," on certain conditions. In May, 1865, President Johnson did the same.

Congress, in time of war, may exercise sovereign and belligerent rights, and may constitutionally authorize the President to pardon on condition or otherwise—especially in civil war, in which the contest is for the establishment of the national authority.

Here he has pardoned, and thus reinstated the parties to their original rights with the same effect as if there had been no offence and no rebellion.

The law, by which this property was lost to the parties, in its application to them and their rights, is repealed before any final distribution is made.

When the law is repealed after decree and before distribution, whether by a special treaty or general law, the property is to be restored. Yeaton vs. United States, 5 Cranch, 281; United States vs. Helen, 6 Cranch, 203; United States vs. Preston, 3 Peters, 57.

HENRY CRAWFORD,
LEWIS & COX.
JOSEPH J. LEWIS,
Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1865.

No. 250.

In Prize.

THE STEAMER WILLIAM BAGALEY and cargo, JOSHUA BRAGDON intervener and claimant, appellant.
vs.
THE UNITED STATES

Appeal from the District Court of the United States for the Eastern District of Louisiana.

ARGUMENT OF HENRY CRAWFORD FOR THE APPELLANT.

COURIER STEAM PRESS, LAFAYETTE, INDIANA.

L. S v 4 Cr. 34)

In the Supreme Court of the United States.

No. 250.

December Term, 1865.

In Prize.

The Steamer William Bagaley and cargo, Joshua Bragdon intervener and claimant, appellant. *vs.* The United States.	Appeal from the District Court of the United States for the Eastern District of Louisiana.

STATEMENT AND ARGUMENT FOR THE APPELLANT.

The steamer William Bagaley sailed out of the blockaded port of Mobile, Alabama, on the night of the 17th of July, 1863, bound on a voyage to Havana, and was captured on the following day (the 18th), by the United States sloop of war Ossipee, about two hundred miles from her port of departure. She was taken to New Orleans and libelled in prize on July 25, 1863. On the 17th of August, 1863, an interlocutory decree was made ordering the sale of the steamer and cargo, and the payment of the proceeds into the registry. (Record, p. 19.) September 4, 1863, the Marshal returned the precept, and paid $218,540 81 into court. (Record, p. 20.) Before the payment of the proceeds into the registry, *viz:* on the 31st of August, Joshua Bragdon, the present appellant, filed an intervention *pro interesse suo*, claiming to be entitled to one-sixth of the proceeds of sale. (Record, p. 21.) The facts upon which he grounded such claim are alleged in the petition to be, that he was and for many years had been, a resident of the city of New Albany, in the State of Indiana; that the

firm of Cox, Brainerd & Co., of the city of Mobile, Alabama, were the sole owners of the captured vessel and her cargo, of which firm the intervenor had been for several years a member and owned one-sixth interest in all the property of the co-partnership, which interest he had never in any way transferred. The petition further averred that the claimant was, and always had been, a true and loyal citizen of the United States, and that he had never in any way aided or abetted the rebellion, and after the breaking out of the same, he had never exercised any act of ownership or control over the property or the captured steamer, and that he had no connection with, or knowledge of the unlawful voyage of the steamer which occasioned her capture. It also shows, that in consequence of the loyalty of the claimant, the so-called Confederate Government seized all his interest and property in said firm of Cox, Brainerd & Co., and by a decree and process of one of her pretended courts confiscated the same. The intervention claims that all such acts and proceedings of the insurrectionary government are void, and the title of the claimant to his property remains undivested and unimpaired, and prays restitution of his share out of the fund. An answer was filed by the United States on December 1, 1863, denying in substance and detail the matters set out as above, (Record, p. 42,) and on the intervention coming up for hearing upon the merits, the District Attorney entered the following admission upon the record: "On the trial of the merits of the intervention of Joshua "Bragdon, the District Attorney admits all the facts alleged "in the libel of intervention." (Record, p. 43.) The court rendered a judgment January 11, 1864, that the intervention be rejected and dismissed with costs. (Record, p. 44.) An appeal was prayed and granted upon the filing of a bond with good sureties in the sum of $60,000 00. This bond was duly filed and the citation of appeal served on the District Attorney and the counsel for the captors upon the 3rd of February, 1864. (Record, p. 48.)

No other claim was interposed in the proceedings in the lower court for any portion of the captured property or its

proceeds, and therefore, the only questions presented by this appeal concern the legal sufficiency and merit of the intervention of Bragdon. The intervention of the claimant avers that he is a loyal citizen of the United States, residing in an adhering State, and the true, legal, present owner of one-sixth of the captured property. The facts are unequivocally conceded to be true by the government. The case is therefore the assertion of an admitted legal ownership, by an admitted loyal citizen of a loyal State. No technical objection can be successfully interposed to such a claim. It is for a proprietary interest, "a property immediately and visibly residing in the "substance of the thing itself," and therefore, cognizable in the Courts of Admiralty and Prize. The Boston, 1 Sumner 328; The Packet, 3 Mason 255; The San Jose Indiano, 2 Gall. 267; The Tobago, 5 Rob. 218; The Marianna, 6 Rob. 24. It is also a claim within the jurisdiction of the court and properly cognizable in these proceedings for condemnation. In the case of a recapture from the enemy in the schooner Dove, Judge Story says: "The jurisdiction of this court "over the present as a prize cause is incontestible, and having "possession of the principal cause it will exert itself over all "the incidents and collateral questions." 1 Gall. 589. And again he says elsewhere, "The admiralty jurisdiction takes "cognizance not merely of the question of prize, but of every "incident thereto until a final adjustment of all claims arising "from the capture." St. Lawrence and cargo, 2 Gall. 21. In support of this doctrine will be found, Sheppard *v.* Taylor, 5 Peters 675; McLane *v.* United States, 6 Peters 404; Jecker *v.* Montgomery, 13 How. 515.

This power to hear and determine all incidents to the general question of prize remains the same, whether the property captured, remains *in specie* in the custody of the court or the proceeds in the registry constitute the subject matter of litigation, for the proceeds of prize in money or otherwise, are in contemplation of law as much prize, as the property actually captured. The French Guiana, 2 Dodson 162; Andrews *v.* Wall, 3 How. 568; Proceeds of prizes, 1 Abbott 495; The Pomena, 1 Dodson 25; The Mary, 2 Dodson 378.

The right to make captures being a sovereign prerogative, the exclusive title to all property seized and condemned vests in the government, and captors and individuals can acquire no interest therein, unless under her grant, and no proceeding can be set on foot for such condemnation except in the name and by the authority of the United States. 3 Phill. Int. Law, 338; The Elsebe, 5 Rob. 173; The Joseph, 1 Gall. 558; The Palmyra, 12 Wheat. 1; The Liverpool Hero, 2 Gall. 188; The Dos Hermanos, 10 Wheat. 306.

It results therefore, that the record presents a question of good prize or lawful property—a contest between the government and a citizen whom she admits to be unshaken in his allegiance, as to the right of the former to forfeit his property or her duty to restore the same upon his application. The government having admitted upon the record, that the claimant was at one time the rightful owner of the property in controversy, and that he has never aliened it, the burden necessarily devolves upon her to show, and clearly show, how he lost title, and by what means she acquired the later and better title. The quality and derivation of the paramount title asserted by her in the premises, is now to be considered.

If the United States has warrant as against the admitted rightful owner, to forfeit this property as good prize, it can only be on account of the commission of some offence against the law of nations. There are only two of such offences which can bear any relevancy to the present case, and they will be treated of in their order.

I. *The claimant's property in vessel and cargo cannot be forfeited as* ENEMIES' PROPERTY.

It is abundantly settled that in order to justify condemnation of property for such reason it is indispensably necessary to establish—(1) the domicil of the owner in the enemy's country, or (2) the employment of the property, either actually or constructively, by him, in illegal trade with the enemy.

(1) Since it is not the place where a thing is, which in the estimation of the international code, determines the nature of that thing, but the character of the person to whom it belongs,

the general principle upon the subject has always been, that the domicil of the party is the true test of national character and determines the nature of property. 1 Kent's Com. 83; The Emanuel, 1 Rob. 296; Upton's Laws of War, 113, 150; and so the property of one resident in the enemy's territory is *res hostiles* and the lawful subject of maritime capture. The Venus, 8 Cranch 253; The Hoop, 1 Rob. 196.

This doctrine is applicable to civil as well as international wars, and during this rebellion, what has constituted "enemies' territory" within the meaning of the rule, has been authoritatively settled by this court in several cases. Grier J. says in delivering the opinion of the majority of the court in the prize cases, 2 Black 635: "It is no loose, unorganized "insurrection, having no defined boundary or possession. It "has a boundary marked by lines of bayonets, and which can "be crossed only by force. South of this line is enemies' "territory, because it is claimed and held in possession by an "organized, hostile and belligerent power." Again, in the Alexander cotton case, 2 Wall. 419, it is holden, "We must "be governed by the principle of public law, that all the "people of each State or district in insurrection against the "United States must be regarded as enemies, until by the "action of the legislative or executive branch of the govern-"ment, or otherwise, that relation is thoroughly and perma-"nently changed." The same principle is applied in the case of The Venice, 2 Wall. 274, thus: "The rule which "declares that war makes all the citizens or subjects of one "belligerent, enemies of the government and of all the citi-"zens of the other, applies equally to civil and to international "wars. The vessel and the cotton, at the time of purchase, "belonged to citizens either of Mississippi or Louisiana, and "was therefore, 'enemies property.'"

It is obvious, the questions presented by this intervention, cannot be injuriously affected by the principle thus announced. The claimant here, was not domiciled on the South side of "the boundary marked by lines of bayonets, which can be "crossed only by force;" nor had he at any time been "a citi-

"zen or subject of any State or district in insurrection against "the United States," but on the contrary, the libel charges and the government admits, that he was and long had been, a resident, loyal citizen of the State of Indiana. Such being the facts, the law of domicil forbids condemnation, and enjoins the protection and restitution of the property.

(2) The other criterion of "enemy's property," is equally powerless to work a forfeiture. It is not permitted for either the citizen or neutral to be engaged in traffic which is forbidden by the laws of war, and any such act cannot be redeemed from guilt, by reason of the domicil of the person who commits the offence. Because the fact of war suspends all pending contracts between the people of the opposing powers, and under heavy penalties, utterly forbids any intercourse whatever between the two classes of citizens, it necessarily follows that if a citizen either in person or by the intervention of a subordinate, employs his property in this prohibited and highly criminal intercourse, he assumes an attitude of hostility to his country, and justly forfeits all the property employed in the unlawful commerce with the enemy. This second test of "enemies' property" is thus succinctly defined by an eminent writer. In discussing what is the subject of capture, he says: "All the property of enemies found afloat, and *all property of citizens or subjects, conducting themselves as belligerents, may be lawfully captured.*" 3 Phill. Int. Law, (450) § 345.

This rule has been applied in such a multitude of cases, that a cursory reference to the language employed by courts, can not fail to give a correct appreciation of its true meaning and limitation. In the leading case of the Rapid, 8 Cranch 155, it is said, "A citizen or ally may be engaged in a hostile trade "and *thereby involve his property in the fate of those in whose cause* "*he embarks.*" Again, "*He incorporated himself into the per-*"*manent interests of the enemy.*" Thirty hogsheads of Sugar *v.* Boyle, 9 Cranch 191. Sir William Scott says: "By intend-"ment of law, all property condemned is the property of "enemies, *that is of persons so to be considered in the particular transaction.*" The Elsebe, 5 Rob. 176. "*He who clings to the*

profits of a hostile connection, must be content to bear its losses also." Upton's Mar. War. 110; 1 Kent's Com. 82. So if a person enter into a house of trade in an enemy's country in time of war, or continue that connection during the war, he cannot protect himself by residence in a neutral country. The Vigilantia, 1 Rob. 15. Upon this particular branch of the subject, Judge Story thus discourses; "The property of "a person may acquire a hostile character although his resi- "dence be neutral. Therefore, *when a person is engaged in "the commerce of the enemy upon the same footing and with the "same advantages as native resident subjects, his property employed "in such trade is deemed incorporated in the general business of "that country, and subject to confiscation*, be his residence where it may." San Jose Indiano, 2 Gall. 268; Massonaire *v.* Keating, 2 Gall. 338; The Friendschaft, 4 Wheat. 105; Story on Part. 449 § 316.

In the case of navigating under the pass or flag of the enemy, it is considered just cause for forfeiture, and the party who uses them is bound by them, and "is not at liberty when "they turn to his disadvantage, to deny the character which "he has worn for his own benefit." The Fortuna Verissimo, 1 Dodson 87; The Success, 1 Dodson 130; The Hiram, 1 Wheat. 440; The Vigilantia, 1 Rob. 13.

All these instances—sailing under the enemy's pass or flag; breach of blockade; carriage of contraband; establishment or continuance of a house of trade in the enemy's country; illegal traffic with the enemy—are cases *of a criminal, voluntary adoption of the enemy character* by the citizen, are palpable and odious violations of his duty to his government, and for that reason, justice requires and the law declares, that all his ventures so employed are the rightful subjects of capture and condemnation as enemies' property.

The application of this principle to the facts of the case at bar, is not difficult. The allegations of the intervention upon this point are, that the claimant never was at any time within the insurrectionary lines, that he had no dominion over his property after the inception of the rebellion, and that he had

no participation in, connection with, or knowledge of, the transactions of his former co-partners, and these facts are admitted to be true by the government.

Instead, therefore, of the claimant's involving his property by "embarking in the cause" of the rebellion, within the meaning of the rule as laid down in The Rapid, *supra*, he maintained his loyalty with such firmness that the rebel government confiscated his property as that of an alien enemy. He did not in any manner "incorporate himself into the "permanent interest of the enemy." He is not seeking, as was the claimant in The Fortuna Verrissimo, *supra*, "To "deny the character, which he has worn for his own benefit," but he is striving to maintain as best he may, the character of a consistently loyal citizen. Other than this he has neither sought nor worn. He has not been, in the language of Judge Story, "engaged in the commerce of the enemy, upon the "same footing and with the same advantages as resident sub-"jects," nor upon any footing or terms whatever. From the commencement of the rebellion, he stood aloof from his rebellious associates; he maintained his proper fealty; he turned his back upon his property, situated within the control of the insurrectionary forces, trusting in the power of the government to re-assert its supremacy, and in its honor to restore. He has "not clung to, nor received the profits of any hostile "connection," but in thought and act has remained true to his obligations as a citizen. He has not, in any manner, "conducted himself as a belligerent," and therefore, as Judge Nelson well remarks in the Prize Cases, 2 Black, 635, it is not possible for the government "to convert a loyal "citizen into a belligerent enemy, or to confiscate his property as enemies' property."

II. *The claimant's property cannot be decreed good prize for any* BREACH OF BLOCKADE, *unless the offence was committed in his interest, and in person or by agent.*

The property of every citizen or neutral who commits a breach of blockade is unquestionably the lawful subject of capture. As to what constitues, upon general principles, such a

breach as justly forfeits the property employed, the authorities are unanimous. It is agreed that the breach of blockade is viewed in all cases as a criminal act. This necessarily implies a criminal intent, and to constitute such intent, a knowledge of the existence of the blockade and the determination to violate it are indispensable. Halleck Int. Law 548; 1 Kent's Com. 147; Wheat. pt. 4, ch. 3, § 28; 1 Duer on Ins. 648; 3 Phill. Int. Law, § 298.

According to Sir William Scott, on a question of violation of blockade, three things must be proven—the existence of an actual blockade; the knowledge of the party supposed to have offended; some act of violation either by coming in or going out, with a cargo laden after the commencement of the blockade. The Betsey, 1 Rob. 92; The Nancy, 1 Acton 59.

Knowledge, guilty intention and an overt act, being under all circumstances the indispensable ingredients of this offence, the books bear testimony to the frequency with which the courts have enforced this wise and salutary discrimination between those who are wholly innocent, and those who are tainted with the corrupt design, and commit the overt act: the property of the one being restored while full forfeiture is visited upon the latter. It is a presumption of the law of prize, that a breach of blockade is committed in the interest of the cargo, and *prima facie*, both vessel and cargo are subject to condemnation. The Alexander, 4 Rob. 93; 2 Wildman Int. Law 203, 206; The Shepherdess, 5 Rob. 262; 1 Kent's Com. 43; Halleck 563; 3 Phill. Int. Law, § 316. Still if it be admitted or clearly established, that the owners of the cargo stood clear even from a possible intention of fraud, their property will be excepted from the penal consequence. 1 Duer on Ins. 686; United States *v.* Guillem, 11 How. 62; The Exchange, 1 Edwards 43; The Neptunus, 3 Rob. 173; 3 Phill. Int. Law, § 318.

"When it appears that a ship was going to a blockaded port "known to the master at the time of sailing, it will be con- "sidered that she was going for the purpose of delivering "cargo, and both will be condemned, although when it ap-

"pears that the intention of the owners of the cargo is pure, "as when the voyage began before the knowledge of the "blockade, and the master on being warned, persists in mere "perversity in going in, the cargo and vessel have been dis- "tinguished." The Adonis, 5 Rob. 256. The leading authorities upon this point will be found collated in the United States *v.* Guillem, 11 How. 62, where the vessel had been guilty of an undoubted violation of the law and was condemned accordingly, but upon the intervention of an innocent owner of a portion of the cargo, it was holden: "Even in "case of a cargo shipped as mercantile adventure, and found "on board of a vessel liable to condemnation for a breach of "blockade, although it is *prima facie* involved in the offence of "the vessel, *yet if the owner can show that he did not participate "in the offence, his property is not liable to forfeiture.*"

It is notable also, how indulgently the courts construe the law in certain cases in favor of the personally innocent, even as against the wilful action of their agents. As when orders have been given for goods prior to the existence of a blockade, and it appears that there was not time for countermanding the shipment afterwards, the courts hold that the owner of the cargo is not responsible for the act of his enemy agent, who might have an interest in sending off the goods, in direct opposition to the interests of his principal. The Exchange, 1 Edwards 39. Under similar circumstances the cargo of an innocent neutral was restored; Sir William Scott saying: "The rule that a principal is bound by the acts of his agent "is obviously too rigid to be applied to a case where it is the "interest of the agent to get the goods off and run the risk of "capture, while the principal is wholly innocent of the risk." The Neptunus, 3 Rob. 173; The Adelaide, 3 Rob. 281.

This broad distinction between guilty property which may be, and the goods of innocent owners which cannot, be forfeited, is recognized throughout all the administration of the law of prize. The case of the carriage of contraband furnishes a forcible illustration. Formerly, under a less refined dispensation of the international code, the presence of contra-

band articles worked a forfeiture of the ship, but this too rigid rule has been relaxed in modern times to a forfeiture of freight and expenses only, save in aggravated cases, or when the contraband articles belong to the owner of the vessel. The Mercurius, 1 Rob. 288; The Jonge Tobias, 1 Rob. 329; The Franklin, 3 Rob. 217. To escape from the contagion of contraband, the innocent articles must belong to a different owner, Wheat. 183; The Staadt Emden, 1 Rob. 31; Halleck Int. Law, 573, for the penalty of forfeiture extends only to all the property of the same owner involved in the same unlawful transaction. 3 Phill. Int. Law, (372;) The Floreat Commercium, 3 Rob. 178; The Sarah Christina, 1 Rob. 242.

The distinction is also approved in the case of carriage of dispatches, which works a forfeiture of the ship which conveys them, and *ob continentiam delicti* of the cargo *if they belong to the same owner*. The Atalanta, 6 Rob. 460.

Also, in the case of the carriage of enemy's goods in the ship of a neutral, when although the specific property is subject to capture, the lien of the neutral for his freight cannot be divested or forfeited. The Francis, 8 Cranch 418; The Marianna, 6 Rob. 25.

While the accepted doctrine is, that a deliberate and continued resistance to search is followed by the legal consequence of forfeiture, The Dispatch, 3 Rob. 278; The Elsebe, 4 Rob. 408; The Maria, 1 Rob. 340; The Mentor, 1 Edward 268; this consequence can not be visited upon the cargo when the owner is innocent of any participation in the unlawful resistance. The Nereide, 9 Cranch 388.

Determined by these tests the interest of the claimant is obviously beyond the reach of forfeiture. The government is in no condition to declare his property good prize for breach of blockade, in the face of her admission that he is wholly innocent of both the criminal intention and the overt act. He comes fairly, within the exception stated in United States *v.* Guillem, 11 How. 62, as "he did not participate in the offense."

There is, however, another principle touching the law of blockade, borrowed from the general admiralty practice, and

of most frequent application. Recognizing the full force of the maxim *qui facit per alium facit per se*, the law of nations properly holds the owners of vessels to be accountable for the acts of those to whom they have entrusted the vessel, and in such cases decrees forfeitures or awards restitution of the owner's property according to the criminal or lawful conduct of their agents. The *jus gentium* requiring the most perfect good faith will not permit a ship owner to shield himself behind a personal innocence to avoid the penal consequences of the conduct of his guilty agents.

Phillimore thus notices the doctrine of agency: "It is a "general rule that ship and cargo are both confiscated for a "breach of blockade, but then an important distinction must "be taken, *viz:* Whether the owners of the cargo are, or are "not indentical with the owners of the ship. If they are not, "the cargo is not confiscable, unless before the goods were "shipped the owners were, or ought to have been, apprised of "the existence of the blockade, or *unless it be shown that under* "*the circumstances the act of the master personally binds them.*" 3 Phill. Int. Law, 306.

"In a case of breach of blockade, in order to make the "conduct of the vessel affect the cargo, it is necessary that "the owners were or might have been cognizant, or *to show* "*that the act of the master of the ship personally binds them.* The "master is the agent of the owners of the vessel, and can "bind them by his contracts or misconduct, but he is not the "agent of the owners of the cargo unless specially so "constituted." The Mercurius, 1 Rob. 82; The Mary, 9 Cranch 126; The Neptunus, 3 Rob. 173.

The reason for this rule of the owner's liability for his agent's conduct, is thus stated by Sir William Scott: "*If the* "*owner of the ship will place his property under the absolute man-*"*agement and control of persons who are capable of lending it to* "*be made an instrument of fraud in the hands of the enemy, he* "*must sustain the consequences of such misconduct on the part of* "*his agent.*" The Ranger, 6 Rob. 126.

And elsewhere, thus: "Owners of cargo must answer to

"the country imposing the blockade, *for the acts of the persons* "*employed by them.*" The James Cook, 1 Edwards 263.

Says Wheaton: "If he is affected at all, it can only be by the application of *the strict legal principle that affects the principal by the conduct of his agent.* pp. 203, 275.

Phillimore again discusses this topic as follows: "*The law* "*indeed is established that the principal is answerable for the acts* "*of his agent,* (*and the master is the accredited agent of the ship* "*owner,*) *not only civilly but penally to the amount of property* "*entrusted to his care. It would be impossible for a court of prize* "*to affect the proprietor in any other way;* and whatever the "hardships may be, it is very much softened by recollecting "that if he has sustained any injury by the fraudulent and "unauthorized acts of his agent, he will be entitled to his "remedy against him." 3 Phill. Int. Law, (615.)

"The act of the master binds the owner with respect to the "conduct of the vessel, as much as if it were committed by "the owner himself." The Vibilia, 1 W. Rob. 15.

"Take the fact to be, that there was a blockade, and the car-"go was put on board after knowledge, I have no hesitation "in saying that the act of the master binds the owner. There "are powers with which the law invests him and if he abuses "his trust it is a matter to be settled between him and the "person who constituted him master, but his act of violation "is, as to the penal consequence, to be considered as the act "of the owner." The Vrouw Judith, 1 Rob. 150.

"This vessel came from America as appears, with innocent "intentions on the part of her American owners, for it was "not known in America that Amsterdam was blockaded, and "therefore there is no proof immediately affecting the owners. "*But a person may be penally affected by the misconduct of his* "*agent as well as by his own acts; and if he delegated general* "*powers to others and they misuse their trust, his remedy must be* "*against them,*" The Columbia, 1 Rob. 154.

"When persons put their property into the hands of their "agent or partner, they must be bound by the consequences "of his acts, as to the property so entrusted to him. *If they*

"*put a vessel into his hands and allow him to employ it as he* "*pleases, whether they are immediately connusant of his practices* "*or not, they are affected with a legal privity and that will be suf-* "*ficient to dispose of their interest in her.*" The Calypso, 2 Rob. 161.

Duer treats thus clearly on the topic: "The misconduct of "the master may in no degree be imputed to the owners, yet "their innocence affords no protection to their property. His "acts may be in direct violation of their express instructions, "may even amount to fraud or barratry, yet the owners will "continue to be bound by their legal consequences, to the same "extent as if they had been performed under their previous "sanction and authority. Indeed the rule, so far as relates to "the ship and the property of the owners, is universal that "they are concluded by the acts of the master. *He is their* "*agent and the property they have entrusted to his care is in all* "*respects responsible for his just observance of the duties of neu-* "*trality.*" 1 Duer on Ins. 676; 2 Wildman Int. Law 194; The Shepherdess, 5 Rob. 262; The Mercurius, 1 Rob. 80; Halleck Int. Law 559.

The general principle distinguishable in all the foregoing citations, was alluded to and enforced by this court in the case of the Hiawatha, 2 Black 635, and all the learning upon the question is collated by Judge Betts in the opinion he delivered in the case of the Bark Springbok, now on appeal to this court, No. 83 upon the docket.

It is safe to assume that the authorities cited above, clearly establish that no forfeiture can be incurred unless the offence was committed by some agent appointed by the owner, and touching the identical property entrusted to his care. If this be correct doctrine, it as clearly follows that the government fails utterly to make out any case against the property of this appellant. It will be remembered that she admits, not only that he was personally innocent of all wrongful practices, but that since the beginning of the rebellion, he, "in no way "exercised any act of ownership or control over his property "and that he had no connection with, or knowledge of the

"unlawful conduct and voyage of the vessel, for which she "was condemned as prize." He had appointed no agents; no one was upon the vessel representing or pretending to represent him, or whose wrongful conduct could in the estimation of a wise and just code be justly imputed to him. Neither was the voyage planned or prosecuted in his interest, for his rebellious co-partners had the exclusive control of the property, while his interest was attempted to be divested by the rebellious government, and no matter how remunerative the illegal voyage might have proven if succesful, it stands upon the record that "the claimant had no connection with, or knowl- "edge" of it. He had "employed" no one; "had constituted "no one master," and so far as his property was concerned, their possession and use of it was wrongful as to him, for he had not entrusted it "to any one." Since the relation of principal and agent did not exist between him and any one on board the vessel, it is simply impossible under the authorities quoted, and the evident justice and reason of the thing, that the claimant should be clothed with great responsibilities, and visited with heavy forfeiture for the conduct of those, in whom he has reposed no authority whatever, to whom he had entrusted no property, and whose every action was utterly beyond his control, and in direct denial of his rights.

So far as concerns Bragdon's interest in this property he was clothed by law with both the right of property and the right of possession, while his co-partners had the naked possession of his interest without right, and under the decree of a false court whose authority cannot for a moment be recognized.

It would be preposterous to contend, that for the deeds of persons guiltily in the possession of property, the true and innocent owner is to be held responsible. Says Nelson J. in the Prize Cases, "the penalty of confiscation for the acts of "others with which she had no concern cannot lawfully be "inflicted." This principle, that the acts of those wrongfully in possession cannot divest the title of the lawful owner, is abundantly supported by authority. "Possession and use,"

says this court in the early case of The Resolution, 2 Dall. 1, "ought upon a question of property to have the same influ- "ence in courts of admiralty as in courts of common law. It "ought to be considered as a good title and as conclusive upon "all mankind *except the right owner*. If the papers affirm the "ship and cargo to be the property of an enemy, there must be "a condemnation unless those who contest the capture can "produce clear and unquestionable evidence to the contrary."

"Upon a piratical capture, the property of the original "owners cannot be forfeited for the misconduct of the captors "in violating the municipal laws of the country where the "vessel seized by them is carried." The Josefa Segunda, 5 Wheat. 338.

The same question arose subsequently, and the court say: "We are of opinion the forfeiture was not incurred since "although it be supposed that the property was in the cus- "tody of those who held for the Spanish owners, *it was not "held by those to whom the Spanish owners had entrusted the ves- "sel and cargo, and this is the only ground upon which the acts of "the ship's company are made to produce forfeitures of the inter- "ests of shippers or ship owners.* The Bello Corrunnes, 6 Wheat. 152.

An English case exactly in point with the present, is The Vriendschap, 6 Rob. 38, where a British ship having been captured by the enemy, was again captured by a British cruiser for a flagrant breach of blockade by a neutral in possession; but the court adhering to the doctrine above quoted, ruled that the illegal acts of those illegally in possession did not divest the title of the rightful owner, and awarded restitution upon his intervening in the proceedings for condemnation.

If an opposite doctrine was conceded, no case could ever occur in which restitution could be awarded, and the jus postliminy would remain to the mockery of the citizen an unmeaning fiction of the law.

III. *The fact that the claimant owns only a portion of the captured property instead of the whole, will not exclude him from the protection of the legal principles above established.*

A brief examination of the authorities will suffice to confirm the power and practice of the courts to discriminate between the guilty and innocent co-owners of the same property, restoring one portion to the citizen and forfeiting the other as the property of enemies and subject to capture.

The exact case is thus put by Sir William Scott: "Formerly according to the old practice, the carriage of contraband "worked a forfeiture of the ship, but in later times the rule has "been relaxed to the forfeiture of the ship only when owned "by the same person. *If he owns a share of the vessel, his share "only will be condemned.*" The Jonge Tobias, 1 Rob. 329.

In Graham's claim, 1 Gall. 618, Judge Story decides: "I "hold this shipment to be on joint account. I therefore hold "William Graham as entitled to one-third part of the present "shipment, and as he is a domiciled British merchant I con-"demn it as lawful prize to the captors. The other two-thirds "belonging to citizens, I order to be restored."

In another instance when a cargo was shipped from Malaga to St. Petersburg in an English vessel, by a Spanish house on joint account with a London firm, the same high authority held, that while the share of the enemy was good prize, the interest of the neutral Spanish house could not be subjected to condemnation. The Betsy, 2 Gall. 377.

A moiety of a vessel owned by British subjects condemned by reason of the illegal trading with ports of a neutral country declared by orders in council to be in a state of blockade. The Success, 1 Dodson 134.

In the case of The San Jose Indiano and cargo, partners' interests were distinguished, the enemies' interests being condemned and citizens' restored, in divers instances. 2 Gall. 284, 298, 300, 301, 303, 304, 305.

Thus far, discussion has been confined to those laws of war upon which any authority for the condemnation of the claimant's property must necessarily rest. It remains to direct the attention of the court to certain other rules of the international code, which authorize and require its restoration.

IV. *The claimant having established an indefeasible legal*

title to this property, was entitled, as soon as it was rescued from the enemy, and came within the dominion of the United States, to full restitution thereof.

The record shows, that long prior to the rebellion, the claimant was the owner of this property. That being within the insurrectionary district, he exercised no control over it, and it was continually within the rebellious territory and under the exclusive authority of rebellious citizens. That in the year 1862, the so-called Confederate Government seized his property *jure belli*, and undertook to extinguish the title of the claimant, by a condemnation and sale. A new register appears to have been taken out after the sale "property having changed," (Record p. 13.) Then follows the capture by our cruisers.

There is then property; an illegal capture by a government neither *de facto* nor *de jure*, but only a rank usurpation; an illegal and void condemnation and sale, and then a restoration of the property to the power of the country of the rightful owner. It being conceded that no taint of fraud or disloyalty can be imputed to the claimant, it would seem to be a proposition almost too plain for argument, that the title of the original proprietor has not been divested by any of these transactions. That the seizure of his property by the insurgent government was illegal and criminal, and that the sentence of condemnation and the proceedings subsequent thereto, were without the semblance of authority and void, are statements which it were idle to elaborate.

The obligation of the government under such a state of affairs, is clearly defined.

"The sovereign is bound to protect the persons and property "of his subjects, and to defend them against the enemy. "When therefore, a subject or any part of his property has "fallen into the enemy's possession, should any fortunate "event bring them again into the sovereign's power it is un-"doubtedly his duty to restore them to their former condition, "to re-establish the persons in all their rights and obligations "—to give back their effects to the owners, in a word, to re-"place everything on the same footing on which it stood pre-"vious to the enemies' capture." Vattel 391, 385.

This right of postliminy, says Halleck, "is founded upon "the duty of every State to protect the persons and property "of its citizens against the operations of the enemy. When "therefore, a subject is rescued by the State or its agents he "is restored to his former rights and condition under his own "State, for his relations to his own country are not changed, "either by the capture or the rescue. So of the property of "the subject re-captured from the enemy by the State or its "agents, it is no more the property of the State than it was "before it fell into the hands of the enemy. It must there-"fore be restored to its former owner." Halleck Int. Law, "866, § 2.

Scott sententiously states the obligation, "a person unjustly "deprived of his property is entitled to restitution, unless his "conduct has in some degree contributed to the loss." The Acteon, 2 Dodson 48.

This doctrine was recognized at a very early day in England. "If a British ship be captured by an enemy and after-"wards purchased by a subject of this realm, she is still the "property of the person from whom she was captured." Woodward *v.* Lacking, 3 Esp. 285.

When a British ship had been captured by the French, condemned as prize and fitted out by them as a vessel of war, and was then recaptured by a British cruiser, it was held that a British subject had always a right, not barred by any given duration of time, to restitution of his property. The Reward, Hay & Marriott 222; The Vriendschap, 6 Rob. 38.

During the war of the rebellion, this right of the citizen to his property and the obligation of the government to restore, have been conceded and enforced and restitution awarded to the true owners. The Mary Alice; The Henry C. Brooks; Lizzie Weston, M.S. Decisions of South. Dist. of New York: Claims of Lear & Sons and Irvin & Co., approved and allowed. Prize cases, 2 Black 281, 282.

Outside the doctrine of postliminy which rests upon its own peculiar principles, the courts of admiralty have been diligent in restoring property in all cases where the original owner's

title has not been lawfully divested, and it is now a doctrine of universal acceptance, that the original title must prevail, unless the property was captured by a lawful enemy, in a lawful manner, and a sentence of condemnation by a competent court has intervened.

A piratical capture cannot divest the owner of his property, but in such cases the property ought to be restored to the original owner, for pirates have no lawful right to make captures. The owner has merely been unlawfully deprived of his possession, to which he is restored by the rescue. Wheat. 438; 1 Molloy 88, § 31, book 1, ch. 4; 1 Rob. 81, 229; 6 Rob. 229; 5 Wheat. 338.

"In piracy as well as felony, the taking away the goods "cannot alter the title therein, nor can lapse of time convert "the ownership which remains in the original owner as if no "such forcible abduction had taken place." The Panda, 1 W. Rob. 433.

It is not essential for the operation of this rule that the capture should be piratical, "a capture though not piratical, may be illegal and of such a nature as to induce the court to award restitution. Talbot v. Janson, 3 Dall. 133. If property be retaken from a captor clothed with a lawful commission but not an enemy it must be restored. For the act of taking being a wrongful act could not change the property. Wheat. Int. Law, 439, 238: Halleck Int. Law 532, and so our courts have invariably decided that where a capture is made of the property of the subjects of a nation in amity with the United States, by a vessel, built, owned, equipped and armed in the United States, it is illegal, and if the property is brought within the jurisdiction of this country it will be restored to the original owner. La Conception, 6 Wheat. 235; The Arrogante Barcelones, 7 Wheat. 496; The Santa Maria, 6 Wheat. 490; The Monte Allegro, 7 Wheat. 520; The Fanny, 10 Wheat. 658; The Vrow Anna Catharina, 5 Rob. 15; The Bello Corrunnes, 6 Wheat. 152.

The absence of a valid sentence of condemnation is considered equally fatal as an illegal capture.

If a neutral State seize and sell the vessel, there being no sentence of condemnation, the title is not changed. Wilson *v.* Forster, 6 Taunt 25; Abbott on Ship. 27.

When a British ship had been captured, carried into Norway and condemned before a French consul, it was held that the sentence was invalid, and the property should be restored. The Kierlighett, 3 Rob. 99. A case is cited at the end of Assievedo *v.* Cambridge in 1695, Lucas Rep. 79; 10 Mod. 77, where restitution was decreed after a long adverse possession, two sales and several voyages. 3 Phill. Int. Law (464;) The Perseverance, 2 Rob. 239.

Inasmuch as in the case at bar, the original seizure by the insurgents was unlawful, and the sentence of condemnation utterly invalid, the application of these authorities is obvious. Upon the general doctrine of restitution, the reasoning of this court in an early case is very appropriate, "all the authorities cited on cases of capture authorized by the rights of war are where the property captured was the property of an enemy. Not an instance has been produced where a capture not authorized by the rights of war has been held to change the property. To say that a capture which is out of the sanction and protection of the rights of war can nevertheless derive a validity from the rights of war is surely a contradiction in terms. *The rights of war can only take place among enemies, and therefore a capture can give no right unless the property captured be the property of an enemy.*" The Resolution, 2 Dall. 1.

V. *The object of the war against rebellion as prosecuted by the government, and its policy repeatedly declared by the legislative and executive departments and followed by the judiciary, require the restoration of this property.*

It is a fundamental doctrine of public law, that war shall not be prosecuted without an object, or by any improper means.

Phillimore says: "war must have the reparation of injury, the re-establishment of right, and the restoration of order for its object and its end. *The means therefore through which this*

process is to be executed, must be in strict conformity with this end." 3 Phill. Int. Law, 100 § 49.

The law of nations gives to a belligerent the right to use only such force as may be necessary to maintain the object for which the war was undertaken. Beyond this, the use of force is unlawful and this necessity forms the limit of belligerent rights. Halleck Int. Law, 412 § 2.

As a nation, we hold our peculiar but praiseworthy opinions upon the subject of belligerent rights, which may be well expressed by borrowing the words of the late Chief Justice Taney: "The genius and character of our American institutions are peaceful, and the power to declare and carry on war was not conferred for the purpose of aggression or aggrandisement, but to enable the general government to vindicate by arms if it should become necessary, its own rights and the rights of its citizens." Fleming *v.* Page, 9 How. 614.

By the rebellion of 1861, it "became necessary," "for the general government to vindicate by arms its own rights and the rights of its citizens."

These words comprehend in and of themselves the whole scope and object of the war of self-defence in which the nation has been engaged for the past few years.

Congress resolved early in the struggle that the war was not waged for conquest or oppression, but "to defend and maintain the supremacy of the constitution, and to preserve the Union." Crittenden resolution, July, 1861.

By the Acts of July 13, 1861, and July 29, 1861, to provide for the suppression of the rebellion, and under the authority of which the war has been mainly carried on, it is enacted that whenever it becomes impracticable to enforce the laws of the United States by the ordinary course of judicial proceedings, it shall be lawful to call out the militia, and employ the army and navy "*to enforce the faithful execution of the laws, and suppress such rebellion.*"

The President says in his proclamation of September 22, 1862, "I do hereby proclaim and declare that hereafter as heretofore, the war will be prosecuted for the object of prac-

tically restoring the constitutional relation between the United States and each of the States and people thereof, in which State that relation is or may be disturbed."

These declarations of the object of the war have been followed by the courts. "The war so far as the government has been an actor, has been defensive, and in protection of the existence and property of the government, and the welfare of its citizens." Betts J. in the Hiawatha. Upton Mar. War. 69. "In a civil war the military power is called in only to maintain the government in the exercise of its legitimate civil authority." Sprague J. in the Amy Warwick. Upton 103.

But while the object of the war was thus clearly defined, the condition of affairs was so anamalous; the contest of such gigantic proportions, and extended over such a vast territory, that any measures which the government might take to defend its existence and restore its supremacy, would necessarily affect the deserving,—the loyal as well as the disloyal.

It is instructive however to note with what jealous care Congress and the Executive so ordered and wielded the belligerent power of the nation, that while it was a weapon against treason, it was as far as possible a shield for the loyal and the oppressed.

Whiting says upon this subject. "The President having adopted the policy of protecting loyal citizens, wherever they may be found, all seizure of their property, and all interference with them have been forborne." Whiting War Powers, 59.

The President in his proclamation of September 22, 1862, says: "The executive will in due time recommend that all loyal persons shall be compensated for all losses they may have incurred by acts of the United States."

The letters of Admiral Porter to the Secretary of the Navy, of May 11 and 31, 1864, touching the Red River cotton, and the proclamation of General Butler on taking possession of New Orleans, are but reiterations of the general policy of the government.

By legislation in every form, the legislative department of the nation has recognized the same distinction and provided

for the protection of all who have in fact maintained their allegiance.

Section 1, of the Act of August 6, 1861, "to confiscate property used for insurrectionary purposes" enacts that if any person shall knowingly use his property or suffer it to be used in aiding, abetting or promoting the insurrection, such property shall be the lawful subject of prize and capture.

The Act of July 31, 1861, appropriates two millions of dollars to purchase arms "to place in the hands of the loyal citizens residing in any of the States, of which the inhabitants are in rebellion against the government of the United States."

Section 9, of the Act amending the Act, regulating commercial intercourse, July 2, 1864, prohibits all further intercourse "except to supply the necessities of loyal persons residing in the insurrectionary States.

Section 3 of the Act to provide for the collection of abandoned property, March 3, 1863, ch. 120, provides, that when the property of any one resident in the seceded States has been seized and sold by virtue of the Act, the owner may go before the court of claims within two years after the suppression of the rebellion, and upon proof of his loyalty will be entitled to receive the proceeds arising from the sale of his property.

Section 7 of the Confiscation Act, July 17, 1862, enacts that "if said property shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property."

An Act to protect certain liens, March 3, 1863, provides that if any loyal citizen holds a lien upon any vessel or other property, that the same shall be preferred to the claim of the government for condemnation.

Section 7 of the act regulating the collection of direct taxes in insurrectionary districts allows any loyal citizen having a lien upon any real estate which has been sold for taxes to redeem the same. February 6, 1863.

It would seem therefore from the testimony of these measures, that both the executive and legislative branches of the

government have declared the settled policy of the nation to be, that no forfeitures shall be inflicted in this war on any but the rebellious, and that under all contingencies the truly loyal citizens South and North shall be protected and secured in the enjoyment of their rights of person and of property. To put any other construction upon these enactments and the general conduct of the war would be to shut our eyes against their obvious and accepted meaning. Such policy is in recognition of the obligations which a just government owes to its faithful citizens, and may well be called *the policy of justice.*

The policy of magnanimity pursued by the government to its rebellious citizens, is embraced in the proclamations of protection, amnesties, pardons and restorations to property and privileges, which are familiar to all, and are in strict conformity with the declared object of the war. Touching the latter, this court has approvingly said: "The same policy may be inferred from the conduct of the war. Wherever the national troops have re-established order under national rule, the rights of persons and property have been in general respected and enforced. Officer Farragut and General Butler expressed in proclamation the general policy of the government. Both were the manifestation of a general purpose which seeks the establishment of the national authority, and the ultimate restoration of States and citizens to their national relations under better forms and firmer guarantees, without any views of subjugation by conquest." The Venice, 2 Wall. 274.

Keeping in view the declared object of this war how is it possible to say, that the condemnation of the property of a loyal citizen of a loyal State is a warrantable exercise of belligerent right; that it would conduce in the remotest degree to the accomplishment of the desired end? For any such purpose it would be wholly impotent. Contributing nothing to "the reparation of injury, the re-establishment of right and the restoration of order," such action on the part of government, would of itself be an injury to the citizen, a palpable denial of his common and constitutional right, and the sure promoter of disorder and discontent. Against any such for-

feiture the government has deliberately set its face. She has pledged herself to her loyal citizens in every form by which a government can express its deliberate purpose,—by legislative enactments—executive proclamations—judicial decisions, the consistent management of war, that this conflict has been waged for the protection and not the destruction of those rights. This claimant alike with every other true citizen has the right to demand, as he does now demand, that the government shall make good her pledges, by according to him the full measure of his rights. After the government has waged war for over four years upon the principle of complete justice to the loyal, and forgiveness to the repentant rebel, it would be little short of monstrous to consecrate the hours of returning peace, to digging among the musty black letter of the international code, seeking to find if possible some authority for the confiscation of the property of a most faithful citizen.

VI. *Under the circumstances of this case, the appellant is entitled to restitution with costs and interest as against the fund,*

This case was not tried or determined in the District Court on any disputed questions of fact. The government admitted in express terms that the claimant owned the property and had done nothing whatever to forfeit his title, and then deliberately proceeded to disregard the title she had just admitted to be valid, and to forfeit the property she conceded was not forfeitable. In other words having the property of the claimant in her possession she unjustly proceeds to deprive him of the same, and declares his title divested, and although the fund was in the Treasury, the claimant was compelled in order to obtain the opinion of this court, to give bond in the sum of sixty thousand dollars.

The general rule is, that a person unjustly deprived of his property is entitled to full restitution,—the value of the property with interest and costs, Amiable Nancy, 3 Wheat. 546; La Amistad de Rues, 5 Wheat. 885; The Lively, 1 Gall. 315; The Anna Maria, 2 Wheat. 327.

There have been several instances in the present war when Congress has directly approved of this principle as applied

to the vessels of neutrals wrongfully seized as prize for breach of blockade, and appropriated the necessary means to pay the damages inflicted by the seizure and delay: $17,150 66 to the British schooner Glen, February 13, 1864; 140,735.15 francs to French schooner La Manche, March 22, 1864; $14,309 13 to Norwegian bark Admiral P. Jordenskiold, February 14, 1863; $1,000 00 to British ship Perthshire, January 17, 1862; $1,850 00 to Danish bark Jorgen Lorentzen, April 25, 1862; $2,791 91 to Spanish bark Providencia, May 12, 1862.

After the tedious delay of over two years, the deliberate denial of his rights and the forcing him at large expense and under heavy bonds, to approach this tribunal for the restoration of his property, it is not asking anything but the strictest of justice, that he shall be allowed interest upon his share of the proceeds unjustly detained from him, and his costs, against the fund. That will be only proper restitution. The government recognizes that rule of dealing with neutrals, shall it be said that she is swifter to recognize her obligations to strangers than to those of her own household?

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

STEAMER WILLIAM BAGALEY AND CARGO
vs.
UNITED STATES.
No. 157.

Appeal from the district court for the eastern district of Louisiana.

THE CASE.

This steamer and cargo, consisting of nearly 800 bales of cotton and some turpentine, were captured on July 18, 1863, about 230 miles from Mobile, after a brisk chase by a number of our naval vessels. The prize was brought to New Orleans and libelled for condemnation.

The only claim interposed was on behalf of one JOSHUA BRAGDON, of New Albany, Indiana, who alleged that as a member of the firm of COX, BRAINARD & CO., of Mobile, he owned *one-sixth* of the vessel and cargo, and of that interest he prayed restitution.—(Rec., pp. 21, 22.)

The court dismissed this claim, and condemned the vessel and cargo.—(Rec., pp. 19, 44.) The claimant, Bragdon, appealed.

THE FACTS.

The register on board of the Bagaley was issued at Mobile on June 16, 1863, under the authority of the "Confederate States," and recited a previous enrolment at that port of date February 3, 1857, and present ownership by Moses Waring, Joseph E. Murrell, and Charles Walsh, "citizens of the Confederate States," and "trustees of association of stockholders." —(Rec., pp. 15, 16.) The master stated that he was appointed captain by these trustees.—(Rec., p. 5.) The vessel sailed under the Confederate flag.—(Rec., p. 8; Int. 4.)

The only paper on board relating to the cargo was an informal manifest expressing a shipment of 824 bales cotton, and 125½ bbls. turpentine, by Joseph E. Murrell, of Mobile, to Havana.—(Rec., p. 13.) The master stated that the cargo was deliverable to Herrera, at Havana, and that no papers were on board for "fear of being captured."—(Rec. p. 6.) He also swore that the "cotton was shipped for the benefit of the owners in Mobile." He had instructions to escape the blockading vessels, but not to resist.—(Rec., p. 7.)

All the officers and crew were, with one exception, "citizens of the Confederate States."

The case is, on its face, a flagrant one of *enemy property* and *breach of blockade*, and on both these grounds the decree of condemnation was right and should be affirmed.

THE LAW.

But it is contended by Bragdon that restitution should be decreed to him of *one-sixth* part of the vessel and cargo; and it is in respect to his claim that the only question of law arises in the cause.

Bragdon alleged:

1. That he was a citizen of Indiana, and a true and loyal citizen of the United States.

2. That he was before the rebellion, and at the time of claiming, a member of the firm of COX, BRAINARD & Co., located and established at Mobile.

3. That this firm owned the captured vessel and cargo.

4. That his interest in the co-partnership, and the property belonging thereto, amounted to *one-sixth* of of the whole value thereof.

5. That during the year 1862 the rebels attempted, by pretended judicial decree, to confiscate his said interest in the co-partnership and its property.

Giving the fullest effect to the allegations of this claim, it is apparent that the claimant is not entitled to restitution of any portion of this property under the following familiar doctrines of the law of war, as administered in the prize courts:

FIRST. The partnership of COX, BRAINARD & Co., of which the claimant was a member, was established and *domiciled* in the enemy country.

The San José Indiano, 2 Gall., 286.

SECOND. Such a partnership is, by the law of war, treated throughout as a *hostile establishment*, and the whole partnership property is liable to capture and condemnation as enemy's property, notwithstanding one or more of the partners may be domiciled in a neutral country; *a fortiori* if some of the partners are domiciled in one of the hostile countries and the rest in the other, the partnership is hostile, and the partners are also personally enemies.

Story on Partnership, § 316, p. 475; The Friendschaft, 4 Wh., 107; The Antonia Johonna, 1 Wh., 167; The Franklin, 6 Rob., 127.

THIRD. The courts of prize, in the language of Lord Stowell, regard vessels as having "a peculiar character impressed upon them by the special nature of their documents, and they have always been held to the character with which they are so invested to the exclusion of any claims of interest that persons living in neutral countries may actually have in them."

The Vrow Elizabeth, 5 Rob., pp. 5, 6.

In the case of the *Bagaley*, she was owned, as alleged, by a mercantile house domiciled at Mobile, carrying on trade and commerce, before and during the war, at and from that port. Mobile was the *home port* of the vessel; she was enrolled there before the war.—(See Confederate Register, rec. p. 16.) And from the rebel authorities there she obtained the register and flag under which she sailed. If such register had affirmed ownership by the firm of Cox, Brainard & Co., of which the claimant was a member, the principle enunciated in the case of the *Vrow Elizabeth* (supra) would require the court to hold the vessel bound by the character imposed on her by the authority of that government from which her documents issued, and under whose flag she sailed.

During the war with Russia, Doctor Lushington, in England, had occasion to consider and apply the doctrine enunciated in the *Vrow Elizabeth*, in the cases of two vessels under the Russian flag, portions of which belonged to Russian subjects, the other shares being

owned by neutral Danes. These cases both occurred at the beginning of hostilities, and the neutral part owners were *bona fide* entitled to their shares at a period antecedent to the war and up to the time of seizure.

The Primus, 29 English L. & E. R., 589; The Industrie, 33, Ibid., 573.

He held that the claims were not maintainable, and that the neutral as well as the hostile shares were confiscable. He decided that the flag and pass are binding on all persons having property in the ship; that whoever embarks his property in shares of a ship is bound by the character of that ship *whatever it may happen to be;* that where a vessel is sailing under a neutral flag, the captors may show that the property is not neutral, but part of it belongs to an enemy, and in that case you divide it and condemn the part which is hostile and not that part which is neutral; and that the proposition is not true *vice versa* that where a vessel is sailing under a *hostile flag* you can claim on behalf of the neutral the property under an enemy's flag; and that no distinction could be made between the flag being adopted prior to the commencement of hostilities, and when there was no reason to suppose that hostilities would have taken place, and the flag being adopted *flagrante bello.*

The cases of the *Primus* and the *Industrie* were cases of *part owners*, whereas the present case is one of alleged ownership by a *partnership*, to which the doctrines just stated are, *a fortiori*, applicable.

FOURTH. This court has in recent cases confiscated the interests of northern persons in vessels engaged

in commerce with the rebel ports for *illicit trading with the enemy*, altogether irrespective of any agency or complicity, on the part of such owners, in the guilty voyages.

The unreported case of the *Pilgrim* and cargo, at December term, 1863, No. 113, was the first of this class of cases. The vessel there was owned, two-thirds in New Orleans, and one-third in New York and Connecticut, and was captured for breach of blockade of New Orleans. Mr. Justice Grier said "the cargo and two-thirds of the vessel were liable to confiscation as enemy property, and the remainder for illicit trading with the enemy."

In the case of the *Herald*, (3 Wallace, 774,) a British vessel was partly owned in New York, and the Chief Justice held that "the shares of the vessel owned in New York might be condemned for trading with the enemy, but it is enough that vessel and cargo were equally involved in breach of blockade."

In neither of these cases was there any imputation of guilty knowledge of the breach of blockade on the part of the loyal Northern part owners.

FIFTH.—Admitting the allegation of the partnership and of the ownership of this vessel by the firm at the time of capture, it is plain that the claimant has no interest, right, or share, in any of the property of the firm, except what remains after the full discharge and payment of all the debts and liabilities of the partnership, and therefore cannot claim or receive restitution of any particular portion of such property as representing the value of his interest therein.

Story on Partnership, § 97.

A court of prize has no means of settling the accounts of the firm and determining the particular interests of the several members in the property. The ownership of this vessel was in the firm, and the resident members at Mobile, who were in possession of her, had authority to divest their own interests as well as the interest of the northern member, in virtue of their general power and agency as recognized by the law of partnership.

SIXTH.—It is evident from the preparatory proofs and papers that a transfer of the vessel had been effected before the present voyage to other persons, who obtained the register found on board, which divested the interest of the firm who may have owned her before the war.

SEVENTH.—Thus far the question has been considered wholly as one of ownership and property; but all interests and rights in both the vessel and the cargo are confiscable for breach of blockade.

It is not competent for owner of either vessel or cargo, in such case, to protect his property from condemnation by showing innocence in the transaction. All parties are concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes. It is the act and intention of the master which determine the guilt or innocence of the property and its liability to confiscation; and this applies equally to vessel and cargo.

Baltazzi *v.* Ryder, 12 Moore's Privy Council, 184.

In this case all the authorities are cited and discussed.

EIGHTH. A hostile character is impressed upon the vessel by the specifically hostile character of the *trade* in

which she had been engaged during the war, independently of the *domicil*, status, or relations of the owners.

The Vigilantia, 1 Rob., 19.

The Planter's Wench, 5 Rob., 22.

The Embden, 1 Rob., 16.

The Endraught, Ib., 22.

The Bermuda, 3 Wallace, 545.

When a vessel is engaged *de facto* for a period of two years exclusively in the navigation and trade of the enemy's country, in the possession and control of enemies, and under their flag, the question of ownership does not arise, and she is confiscable in consequence of the hostile taint which such use and employment affix upon the property.

NINTH. It is clear that the claimant, upon the facts stated in his "petition," is not entitled to restitution of his alleged interest in this vessel and cargo, and that any such interest is confiscable in a court of prize, both as enemy's property and for breach of blockade. The court below properly dismissed his claim, and pronounced for condemnation of the entire vessel and cargo.

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